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AN EDITORIAL

ONE YEAR AGO, in this space, we reported that the adoption of a Uniform Arbitration Law by the Commissioners on Uniform State Laws and the American Bar Association represented "a most important milestone in the progress of arbitration." That action culminated years of serious discussion and planning on the part of advocates of arbitration and the document drafted by the Commissioners in 1955 inevitably reflected the sometimes conflicting viewpoints of labor and management representatives as well as of those whose primary concern was commercial arbitration. As was predicted at that time, adoption of the Uniform Law did not end debate; on the contrary, discussions continued at an accelerated pace.

Several articles, pro and con, appeared in *Labor Law Journal;* the Northeastern Regional Meeting of the American Bar Association, assembled in Hartford, devoted a special panel to full and searching examination of the Uniform Act; the Legislative Committee of the National Academy of Arbitrators studied the document and issued an adverse report with respect to some provisions affecting labor-management arbitration; and on the West Coast, the Labor Relations Institute of the University of California made some critical comments and suggestions for improvement. These were some of the formal expressions which followed the action of the Commissioners last year. There was also discussion at informal meetings and in correspondence, all directed at making the Uniform Law a more workable document which would serve the needs of all.

While many sections of the Law came under scrutiny, it soon became apparent that principal concern was with Section twelve, which describes the circumstances permitting courts to vacate arbitral awards. It was the opinion of many that the Act gave parties too much latitude in attacking awards. Even some who didn't quite agree with that position conceded that improved draftsmanship was possible. It was pointed out, for instance, that incompleteness or vagueness of an award need not lead to vacation, as Section twelve had provided, but could be corrected by remanding the case to arbitrators under Section thirteen.

All suggested changes were communicated to MAYNARD E. PIRSIG, Chairman of the Special Committee on Uniform Arbitration Act of

(*Continued on Page* 174)

AMONG OUR CONTRIBUTORS

RALPH E. KHARAS is Dean of the University of Syracuse College of Law and ROBERT F. KORETZ is an Associate Professor at the same school. Although they collaborated on the article in this issue, which also appeared in the *Syracuse Law Review,* Volume 7, pages 193-205, 1956, they are recognized separately as authorities on the law of labor relations. Professor Koretz has contributed dozens of articles to legal periodicals and Dean Kharas has addressed a number of arbitration conferences at universities. Both are members of AAA's National Panel of Arbitrators and serve frequently as arbitrators of labor-management disputes. Other public service activities have included membership on Wage Stabilization and other governmental boards. Dean Kharas is presently a member of the New York State Mediation Board.

TRAN MAWICKE is a well-known commercial artist whose work has been seen in leading magazines of the country. He has also exhibited portraits and water colors and recently returned from Japan, Formosa and the Phillipines where, on commission from the U. S. Air Force, he did a series of paintings which will hang in the new Air Academy at Colorado Springs. He discusses a subject which, while of special interest to artists and advertising agencies, will also concern the general businessman who looks for ways of keeping his trade free of unfair practices.

AN OUTLINE OF A COURSE IN ARBITRATION LAW

by J. Noble Braden and Martin Domke

NOTE: The Course deals with the law of commercial, labor-management and foreign trade arbitration. In case the Course is confined to labor arbitration, Lectures No. III, The Commercial Arbitration Agreement, No. XI, International Trade Arbitration, and No. XII, Conflict of Laws, could be omitted and replaced by an extension of Lectures Nos. IX and X, on the basis of the material therein indicated. For further data see Outline of a Labor-Management Arbitration Course, 10 Arbitration Journal (N.S.) 115-130, and Arbitration Bibliography (published by American Arbitration Association, 1954), chapters II and III (p. 15-49).

Cases mentioned are primarily those of recent date which contain ample references to earlier case law.

CONTENTS

Lecture No. 1 — Introduction

General outline of matters to be covered during the entire course; suggestion that subjects of term papers be selected on basis of student's personal interest in a particular phase of arbitration. Top papers may be submitted to the Arbitration Journal for possible publication. A number of other publications, including law reviews, are interested in receiving arbitration material.

1. *Definition of Arbitration* (not: mediation or compromise; arbitration as a process of voluntary settlement of disputes).

2. *Summarized History of Arbitration,* in commercial, labor-management and international trade relations.

SUGGESTED READINGS:

Cohn, Commercial Arbitration and the Law (New York, 1918).
Sayre, Development of Commercial Arbitration Law, 37 Yale L. J. 595-617 (1927).

Jones, Historical Development of Commercial Arbitration in the United States, 12 Minn. L. R. 240 (1927).

Wolaver, The Historical Background of Commercial Arbitration, 83 Univ. of Pa. L. R. 132-146 (1934).

Witte, Historical Survey of Labor Arbitration, University of Pa. Labor Relations Series (1952).

Kellor, Arbitration and the Legal Profession (Report for the Survey of the Legal Profession, 1952; available for distribution to class).

W. C. Jones, Three Centuries of Commercial Arbitration in New York, Washington University Law Quarterly 1956 P. 193.

3. Common Law and Statutory Arbitration
Basic Differences:

   (a) Development of the common law system (revocability of arbitration agreement).

   (b) Status of common law arbitration in the United States today: its enforcement.

   (c) Status of statutory arbitration law.

   (d) Coexistence of common and statutory arbitration systems.

SUGGESTED READINGS:

Sturges, Commercial Arbitrations and Awards (Kansas City, Mo. 1930), and Sturges, Cases on Arbitration Law (New York, 1953).

CASES:

Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109 (1924).

Fidelity & Dep. Co. of Md. v. Woltz, 234 App. Div. 823, 253 N.Y.S. 583 (1931).

Park Construction Co. v. Independent School Distr., 209 Minn. 182 (1941), 216 Minn. 27 (1943). Note in 135 A.L.R. 79-99.

Rueda v. Union Pacific Railroad, 180 Ore. 133, 175 P. 2d 778 (1947). Note, 26 Ore. L. Rev. 280.

Tejas Development Co. v. McGough Bros., 165 F. 2d 276 (C.C.A. 5, 1947).

As illustration, cases should also be used of the federal and state jurisdictions of the area where the respective college is located, or of nearby states. Examples will be found in the two books of Dean Sturges.

Lecture No. II — Arbitration Statutes—The Arbitration Agreement

I. Arbitration Statutes:

United States Arbitration Act, 9 U.S.C. Par 1 et seq.

New York Arbitration Law, N.Y. Civil Practice Act, Art. 84.

The Arbitration Statute of the State where the course is being given.

Uniform Arbitration Act, as amended and adopted by the National Conference of the Commissioners on Uniform State Laws and approved by the American Bar Association (August, 1956).

(Copies of these statutes are available for distribution.)

SUGGESTED READINGS:

Sturges, Some General Standards for a State Arbitration Statute, 7 Arb. J. (N.S.) 194-200 (1952).

Pirsig, Toward a Uniform Arbitration Law, 9 Arb. J. (N.S.) 115-119 (1954); New Uniform Arbitration Act, 11 Business Lawyer (Am. Bar Assn.) 44-51 (1956).

A Uniform Arbitration Act for Illinois? 1955 Ill. Law Forum 297-311 (1955).

Isaacson, A Partial Defense of the Uniform Arbitration Act, 7 Labor L. J. 329-334 (1956).

2. The Arbitration Agreement.
   (a) Difference between "future dispute" clauses and submission; limited and restricted clauses. (Typical clauses to be distributed.)
   (b) Types of standard form contracts in which future dispute clauses are used by various industries and trades, and in collective bargaining agreements.
   (c) Enforcement of future dispute clauses under the various arbitration statutes (Federal and State Arbitration Acts).
   (d) The applicability of State Arbitration Statutes to employer-employee disputes.

SUGGESTED READINGS:

Note, Arbitration Case Law of the Last Decade, 26 Va. L. R. 327-354 (1940).

Annual Survey of American Law (N.Y.U.), Chapter on Arbitration in each volume.

Sturges, Arbitration under the Arbitration Statutes of Texas, 31 Texas L. Rev. 833-865 (1953).

———, Some Confusing Matters Relating to Arbitration in Pennsylvania, 99 Univ. of Pa. L. Rev. 727-765 (1951); Some Confusing Matters Relating to Arbitration in Washington, 25 Wash. L. Rev. 16-42 (1950).

Labor Relations and the Law. Edited by Robert E. Mathews (Boston 1953), esp. p. 360-407.

Lecture No. III — The Commercial Arbitration Agreement

1. Statutory requirements as to validity and form: Arbitration clause and submission.
   (a) *United States Act*—9 U.S.C.A. Par. 2.

CASES:

American Locomotive Co. v. Chemical Research Corp., 171

F. 2d 115, cert. denied, 336 U. S. 909 (1948); *Fox v. The Giuseppe Mazzini,* 110 F. Supp. 212 (1953).

(b) *New York Act*—Civil Practice Act sec. 1448 and 1449.

CASES:

Catz American Sales Corp. v. Holleb & Co., 298 N.Y. 504 (1948); *Albrecht Chemical Co. v. Anderson Trading Corp.,* 298 N.Y. 437 (1949); *Arthur Philip Export Corp. v. Leathertone, Inc.,* 275 App. Div. 102 (1949).

(c) *Arbitration Statute* of state where college is located.

2. Incorporation of Arbitration Agreements into contract by reference to trade rules.

Japan Cotton Trading Corp. v. Farber, 233 App. Div. 354 (1931); *Western Vegetable Oils v. Southern Cotton Oils,* 141 F. 2d 235 (C.A. 9, 1944); *American Almond Products Corp. v. Consolidated Pecan Sales Corp.,* 144 F. 2d 448 (C.A. 2, 1948); *Riverdale Fabrics Corp. v. Tillinghast-Stiles Co.,* 306 N.Y. 288 (1953), Note in 41 A.L.R. 2d 872-878 (1956).

3. Enforceability of the Arbitration Agreement.

Exclusion of types of controversies from statutory arbitration (title to real property; custody of children; distribution of decedent's estate). The arbitrability of an issue to be determined by courts or by the arbitrator.

SUGGESTED READINGS:

Vaughan, Jurisdiction of the Federal Courts Under the U. S. Arbitration Act, 27 Texas L. R. 218-231 (1948).

Enforceable Arbitration of Commercial Disputes in the Textile Industries, 61 Yale L. J. 686-717 (1952).

Annotation: Violation or Repudiation of Contract—Protecting Right to Enforce Arbitration Clause Therein, 3 A. L. R. 2d 383-440 (1949).

CASES:

Constitutionality of arbitration statutes: *Berkowitz v. Arbib & Houlberg,* 230 N.Y. 261 (1921) (New York Statute of 1920); *Marine Transit Corp. v. Dreyfus,* 284 U. S. 263 (1932; U. S. Arbitration Act of 1925); *People v. Crystal River Corp.,* 280 P. 2d

429 (Col. 1955); *Watkins v. Department of Highways of the Commonwealth of Kentucky,* 290 S.W. 2d 28 (Kentucky 1956).

The place of arbitration, as determined by rules: *Bradford Woolen Corp. v. Freedman,* 71 N.Y.S. 2d 257 (1947).

Expiration of contract does not bar arbitration of disputes arising during lifetime of an agreement: *Matter of Linne,* 268 App. Div. 982 (N.Y. 1st Dept. 1944); *Lane v. Endicott Johnson Corp.,* 274 App. Div. 833 (N.Y. 3rd Dept. 1948).

Reference to arbitration in another jurisdiction: *Matter of Inter-Ocean Food Products, Inc.,* 205 App. Div. 426, 201 N.Y.S. 356 (1923); *Nippon Ki-Ito Kaisha v. Ewing Thomas Corp.,* 313 Pa. 442, 170 Atl. 286, 93 A.L.R. 1067 (1934); *The Edam,* 207 F. Supp. 8 (S.D.N.Y. 1938). Cp. also notes in 25 Fordham L. Rev. 133-137 (1956) and 31 N.Y.U. L. Rev. 949-952 (1956).

Revocability of agreement: *Wilson v. Gregg,* 255 P. 2d 517 (Okla. 1953).

Arbitration in stockholder agreements of close corporations: *Matter of Burkin,* 286 App. Div. 740 (1955). Notes, 69 Harv. L. Rev. 1323-1325 (1956); 30 St. John's L. Rev. 262-269 (1956).

Appraisal agreements: *Matter of Delmar Box Co.,* 309 N.Y. 60, 127 N.E. 2d 808 (1955). Note: 25 Fordham L. Rev. 160-163 (1956).

Lecture No. IV — The Initiation of Arbitration Proceedings and Preparation of the Case

1. Commencement of proceedings by demand or submission (its use and form).
2. The exhaustion of the grievance machinery in the collective bargaining agreement.
3. Arbitration Rules.
   (a) Purpose of Rules and discussion of Rules of certain industries.
   (b) Analysis of important provisions of Rules from commencement of proceeding through rendition of award.
   (c) The lawyer's role as representative of the party; waiver of right to representation-by-counsel provisions; Section 1454 (1) C.P.A. New York, as amended.

4. The role of an administrator in arbitration.
   (a) Panel of arbitrators.
   (b) Clerks.
   (c) Administration.
5. Standards for Commercial Arbitration, and Code of Ethics and Procedural Standards for Labor-Management Arbitration. (Copies available for distribution.)
6. Preparation of the case: marshalling of evidence, affidavits, etc.
7. Effect of participation in arbitration without timely protest or reservation.

(Forms and Rules available for distribution.)

SUGGESTED READINGS:

Braden, Sound Rules and Administration in Arbitration, 83 Univ. of Pa. L. R. 189-205 (1934).

Braden, Labor Arbitration Procedures and Techniques (to be distributed).

Phillips, A Lawyer's Approach to Commercial Arbitration, 44 Yale L. J. 31-52 (1934).

Lecture No. V — The Arbitrator

1. Types of arbitration boards—single (ad hoc), three arbitrators (ad hoc), tripartite and permanent arbitrator.
   (a) Advantages and disadvantages of each.
   (b) Method of naming arbitrator as governed by agreement of parties; function of court in appointment of arbitrators.
   (c) Sources for arbitrators—selected by parties from panel of trade associations, etc.

SUGGESTED READINGS:

Note, The Use of Tripartite Boards in Labor, Commercial and International Arbitration, 68 Harv. L. Rev. 293-339 (1954).

Note, Validity and effect of arbitration agreement provision that, upon one party's failure to appoint arbitrator, controversy may be determined by arbitrator appointed by other, 47 A.L.R. 2d 1346-1349 (1956).

2. The Arbitrator's functions. Qualifications and standards of impartiality.

SUGGESTED READINGS:

Note, Disqualification of arbitrator due to prejudicial relations to one of the parties, 17 N.Y.U.L.Q.R. 660-666 (1940).

Note, Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of award, 47 A.L.R. 2d 1362-1367 (1956).

CASES:

American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 N.Y. 398 (1925; quasi-judicial capacity of the arbitrator).

Wenger & Co. v. Propper Silk Hosiery Mills, 239 N.Y. 199 (1924; methods of selection).

Amtorg Trading Corp. v. Camden Fibre Mills, 304 N. Y. 519 (1952; arbitration agreement of 1947 providing for arbitration in Moscow).

Matter of Meinig Co., 266 N.Y. 418 (1934); *St. George Textile Corp. v. Brookside Mills, Inc.,* 85 N.Y.S. 2d 621 (1948); *Knickerbocker Textile Corp. v. Sheila-Lynn, Inc.,* 259 App. Div. 992 (1940): impartiality of arbitrator.

Petrol Corp. v. Groupement d'Achat, 84 F. Supp. 446 (S.D.N.Y. 1949): waiver of disqualification.

San Carlo Opera Corp. v. Conway, 72 F. Supp. 825, aff'd 163 F. 2d 10 (2d Cir. 1946): court removal of arbitrator.

Griffith Co. v. San Diego College for Women, 45 Cal. 2d 528, 289 P. 2d 476 (1955): outside consultation by arbitrator.

Termination of arbitrator's office:

Rust Engineering Co. v. Lehigh Structural Steel Co., 59 F. 2d 1038 (C.A. Dist. Col. 1935), cert. den. 287 U.S. 626.

Note: Doctrine of Functus Officio, 17 N.Y.U.L.Q.R. 666-669 (1940).

3. The conduct of the hearings. The attitude of the arbitrator at the hearings, as compared with that of a judge and jury; a comparison of a trial with an arbitration hearing.

Oath and subpoena power; granting and refusal of adjournment; reopening of proceedings; the use of briefs.

No independent investigation by arbitrator.

CASES:

Berizzi v. Krausz, 239 N.Y. 315 (1925); *Tutein v. Hudson Valley Coke and Products Corp.,* 290 App. Div. 419, aff'd 256 N.Y. 530 (1931); *Sampson Motors, Inc. v. Roland,* 263 P. 2d 445 (Cal. App. 1953).

Lecture No. VI — Some Problems of Arbitration Practice

1. Consent to jurisdiction: *Gantt v. Hurtado,* 297 N.Y. 433 (1948), cert. den. 335 U.S. 843; *American Locomotive Co. v. Chemical Research Corp.,* 171 F. 2d 115 (6th Cir. 1948; "ousting the courts of jurisdiction").

2. Service of process: *Liberty Country Wear v. Riordan Fabrics,* 96 N.Y.S. 2d 134 (1950).

3. Time limits for presentation of claim: *Tuttman v. Kattan, Talamas Export Corp.,* 274 App. Div. 395 (1948).

4. Invalidity of arbitration agreement: *Goldhill Trading & Shipping Co. v. Caribbean Shipping,* 56 F. Supp. 81 (1944; frustration of charter party); *Lipman v. Haeuser Shellac Co.,* 289 N.Y. 76, 142 A.L.R. 1088 (1942; impossibility of performance); *Cheney Brothers v. Joroco Dresses,* 245 N.Y. 375 (1927); *Almacenes Fernandez v. Goladetz,* 148 F. 2d 625, 161 A.L.R. 1420 (C.A. 2, 1945; fraud in inducement).

5. Waiver of arbitration: *La Nacional Plantanera S.L.C. v. North American Fruit & Steamship Corp.,* 84 F. 2d 881 (C.C.A. 5th 1935); *Radiator Specialty Co. v. Cannon Mills, Inc.,* 97 F. 2d 318, 117 A.L.R. 299 (C.C.A. 4th 1938); *Haupt v. Rose,* 265 N.Y. 108 (1943).

6. Provisional remedies outside of arbitration proceedings: *American Reserve Insurance Co. v. China Insurance Co.,* 297 N.Y. 322 (1948); *Anaconda v. Am. Sugar Refining Co.,* 332 U.S. 42 (1943).

7. Examination before trial, whether permissible in arbitration: *North American Rayon v. Putnam,* 276 App. Div. 832.

8. Arbitration without court order: *Finsilver, Still & Moss v. Goldberg, Maas & Co.,* 253 N.Y. 382 (1929), 69 A.L.R. 809.

9. Statute of limitations in arbitration: *Reconstruction Finance Corp. v. Harrisons & Crosfield, Ltd.*, 204 F. 2d 366 (C.A. 2, 1953); note in 37 A.L.R. 2d 1125-1130 (1954).

Lecture No. VII — The Award

1. Statutory requirements.
   (a) Form of award.
   (b) Its contents; the custom of not stating reasons in commercial arbitration; use of opinions in labor arbitration.
   (c) The equity powers of the arbitrator: specific performance, injunctive relief.
2. Confirmation of an award (entry of judgment).
3. Challenge of an award—for bias or misconduct of an arbitrator, excess of authority, etc.
4. Modification or correction of award by courts. Remanding to the arbitrator.

SUGGESTED READINGS:

Phillips, Rules of Law or Laissez-Faire in Commercial Arbitration, 47 Harv. L. R. 590-627 (1934).

Note: Predictability of Result in Commercial Arbitration, 61 Harv. L. R. 1022-1033 (1948).

Note: Judicial Review of Arbitration Awards on the Merits, 63 Harv. L. Rev. 681 (1950).

CASES:

Red Cross Line v. Atlantic Fruit Corp., 264 U.S. 109 (1924; enforcement also under common law).

Continental Grain Co. v. Dant & Russell, Inc., 118 F. 2d 967 (9th Cir., 1941; enforcement in District Court of the place of hearing).

No court review of the award as to facts and law: *Delma Engineering Corp. v. John A. Johnson Contracting Corp.*, 293 N.Y. 653 (1944); *United Shellac Corp. v. A. M. Jordan, Ltd.*, 277 App. Div. 147 (N.Y. 1st Dept., 1950); *Stecklow Bros. v. Carol Management Corp.*, 78 N.Y.S. 2d 427 (1948).

SEE ALSO:

Albert v. Goor, 218 P. 2d 736 (Arizona 1950); *Batter Building Materials Co. v. Kirschner,* 110 A. 2d 464 (Conn. 1954; notes in 41 Va. L. Rev. 523-525 (1955), 35 Boston Univ. L. Rev. 441-447 (1955); *Bennett v. Lodgen's Market,* 90 N.E. 2d 836 (Mass. 1950); *Fred J. Brotherton v. Kreielsheimer,* 83 A. 2d 707 (N.J. 1951); *Campbell v. Automatic Die & Products Co.,* 162 Ohio 321, 123 N.E. 2d 401 (Ohio 1954); *Carhal Factors v. Salkind,* 76 A. 2d 252 (N.J. 1950); *Cassara v. Wofford,* 62 S. 2d 56 (Fla. 1953); *Commercial Factors Corp. v. Kurtzmann Bros.,* C.A. 2d 133, 280 P. 2d 146 (Cal. App. 1955); *H. S. Cramer & Co. v. Washburn-Wilson Seed Co.,* 233 P. 2d 809 (Idaho 1951); *Hutto v. Jordan,* 36 So. 2d 809 (Miss. 1948); *Horne v. State Building Commission,* 76 So. 2d 356 (Miss. 1954); *Jordan Marsh Co. v. Beth Israel Hospital Assn.,* 118 N.E. 2d 79 (Mass. 1954); *Loretta Realty Corp. v. Massachusetts Bonding and Insurance Co.,* 114 A. 2d 846 (R. I. 1955); *Lowengrub v. Meislin,* 376 Pa. 463, 103 A. 2d 405 (Pa. 1954); *McDevitt v. McDevitt,* 73 A. 2d 394 (Pa. 1950); *Martin v. Winston,* 40 S.E. 2d 247 (Va. 1946); *Regorrah v. Vigneau,* 55 N.W. 2d 164 (Mich. 1952); *Pawling v. Malley,* 237 P. 2d 663 (Cal. App. 1951); *Pick Industries v. Gebhard-Berghammer,* 264 Wisc. 353, 60 N.W. 2d 254 (Wisc. 1953).

Lecture No. VIII — The Lawyer's Place in Arbitration

1. The economic aspect of the practice of arbitration, as one of the tools of the lawyer.

   The growing use of arbitration in various fields.

2. Specific questions for the lawyer:
   (a) in considering the use of arbitration clauses in agreements,
   (b) in preparation of the case,
   (c) opening statements in arbitration hearings.

3. His attitude and tactics during the hearing, as distinguished from those employed in court; examination of witnesses, cross-examination, closing arguments and briefs.

4. The place of "precedents" in arbitration.

5. Ancillary court proceedings.
   (a) Motions to stay.
   (b) Motions to compel.
   (c) Motions to confirm.
   (d) Motions to vacate.
   (e) Motions to modify or correct award.

SUGGESTED READINGS:

Gotshal, The Lawyer's Function in Arbitration, 8 Arb. J. (N.S.) 23-36 (1953).

Mosk, The Lawyer and Commercial Arbitration, 39 Am. Bar Assn. J. 193-198 (1953).

Wirtz, Collective Bargaining: Lawyer's Role in Negotiations and Arbitrations, in Readings on Labor Law, edited by Charles A. Reynard, p. 161-172 (1955).

Lecture IX — The Application of the Federal Statutes to Labor Arbitration

1. Exclusion of collective bargaining agreements through section 1 of the Federal Arbitration Act providing that "nothing herein contained shall apply to contracts of employment of any class of workers engaged in foreign or interstate commerce."

CASES:

Donahue v. Susquehanna Collieries Co., 138 F. 2d 3 (C.A. 3); *Watkins v. Hudson Coal Co.,* 151 F. 2d 311 (C.A. 3); *Amalgamated Association v. Greyhound Lines,* 192 F. 2d 310 (C.A. 3); *Pennsylvania Greyhound Lines v. Amalgamated Association,* 193 F. 2d 327 (C.A. 3); *Tenney Engineering Co. v. United Electrical R & M Workers,* 207 F. 2d 450 (C.A. 3); *Shirley-Herman Co., Inc. v. International Hod-Carriers,* 182 F. 2d 806; *Agostini Bros. Building Corp. v. United States,* 142 F. 2d 854 (C.A. 2); *International Union v. Colonial Hardware Flooring Co.,* 168 F. 2d 33 (C.A. 4); *Gatliff Coal Co. v. Cox,* 142 F. 2d 876 (C.A. 6); *Lewittes & Sons v. United Furniture Workers,* 95 F. Supp. 851 (S.D.N.Y.); *Ludlow Mfg. & Sales Co. v. Textile Workers Union,* 108 F. Supp. 45 (D.C. Del.); *Signal-Stat Corp. v. United Electrical Workers,* 26 L.A. 736 (C.A. 2, 1956).

COMPARE ALSO:

Hoover Motor Express Co. v. Local Union 327, 217 F. 2d 49 (C.A. 6, 1954); *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198 (1956), Note in 7 Syracuse L. Rev. 353-356 (1956).

SUGGESTED READINGS:

Sturges and Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act, 17 Law and Contemporary Problems 580-629 (1952).

Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591-607 (1954).

Notes, 40 Va. L. Rev. 209 (1954); 102 Univ. of Pa. L. Rev. 558 (1954); 63 Yale L. J. 729 (1954).

2. Specific enforcement of arbitration clauses and awards through Sec. 301 (a) of the Labor-Management Relations Act of 1947.

The Taft-Hartley Act provides in Section 301 (a) for suits for violation of collective bargaining agreements in interstate commerce.

CASES:

Textile Workers Union of America v. American Thread Co., 113 F. Supp. 137 (D.C. Mass.).

International Union, United Auto Workers v. Jacobs Mfg. Co., 120 F. Supp. 228 (D.C. Conn.).

Insurance Agents' International Union v. Prudential Insurance Co., 122 F. Supp. 869 (D.C. Pa.).

Wilson Brothers v. Textile Workers Union of America, 132 F. Supp. 163 (S.D. N. Y.).

Lincoln Mills of Alabama v. Textile Workers Union of America, 230 F. 2d 81 (C.A. 5, 1956). Cp. the dissenting opinion of Brown, C. J.

Textile Workers Union v. Aleo Mfg. Co., 94 F. Supp. 626 (D.C. N. C.).

Milk & Ice Cream Drivers Union v. Gillespie Milk Products Corp., 203 F. 2d 650 (C.A. 6).

United Electrical Workers of America v. Landers, Frary & Clark, 119 F. Supp. 877 (D.C. Conn.).

SUGGESTED READINGS:

Katz and Jaffe, Enforcing Labor Arbitration Clauses by Section 301, Taft-Hartley Act, 8 Arb. J. (N.S.) 80-88 (1953).

The Specific Enforcement of Collective Bargaining Agreements under Sec. 301 (a) of the Taft-Hartley Act, 21 U. of Chicago L.R. 251-265 (1954).

Note, Interpretation and Application of Sec. 301 (a) of the Labor-Management Relations Act, 103 University of Pennsylvania L. Rev. 902-935 (1955).

3. State Arbitration Statutes in their application to labor management disputes.

California: *Levy v. Superior Court,* 15 Cal. 2d 692 (1940); cp. Kagel in 38 Cal. L. Rev. 799-829 (1950).

Pennsylvania: *Goldstein & Segal v. International Ladies' Garment Workers Union,* 328 Pa. 385 (1938); Cp. Sturges & Ives in 99 Univ. of Pa. L. Rev. 727-765 (1951).

FOR ADDITIONAL CASES, SEE:

American Brass Co. v. Torrington Brass Workers' Union, Local 423, 107 A. 2d 255 (Conn. 1954); *Anco Products Corp. v. TV Products Corp.,* 92 A. 2d 625 (Super. Ct. N. J. 1952); *Calvine Cotton Mills v. Textile Workers Union of America,* 79 S.E. 2d 181 (N. C. 1953); *Collingswood Hosiery Mills v. American Federation of Hosiery Workers,* 101 A. 2d 372 (Super Ct. N. J. 1953); *Lewiston-Auburn Shoeworkers Protective Assn. v. Federal Shoe, Inc.,* 114 A. 2d 248 (Maine 1955); *Local 63, Textile Workers Union of America, CIO,* 109 A. 2d 240 (Conn. 1954); *Magliozzi v. Handschumacher,* 327 Mass. 569 (Mass. 1951); *O'Malley v. Petroleum Maintenance Co.,* 143 A.C.A. 323 (Cal. App. 1956); *Povey v. Midvale Co.,* 105 A. 2d 172 (Super. Ct. Pa. 1954); *Shepard & Morse Lumber Co. v. Collins,* 256 P. 2d 500 (Ore. 1953); *Smith v. Hillerich & Bradsby,* 253 S.W. 2d 629 (Ky. 1952).

4. Note, Constitutionality of Public Utility Compulsory Arbitration Statutes, 49 Col. L. Rev. 661-676 (1949).

Cp. public policy viewpoint in *Black v. Cutter Laboratories,* 76 S. Ct. 824 (1956), and the Notes to 43 Cal. 2d 813 (1955) in 68 Harv. L. Rev. 1285-1287, 6 Syracuse L. Rev. 357-359, 28

So. Cal. L. Rev. 410-414, 103 Univ. of Pa. L. Rev. 983-988 (1955).

Lecture No. X — The Use of Arbitration in Labor-Management Relations

1. Extent to which arbitration is employed in collective bargaining agreements. Arbitration as last step in the grievance machinery.
2. Differences between voluntary and compulsory arbitration systems.
3. Compulsory labor arbitration statutes and their constitutionality.
4. The function of administrative agencies.
   (a) Federal Mediation and Conciliation Service.
   (b) National Mediation Board.
   (c) State Boards of Mediation and Conciliation, especially that of the State where the course is being given.
   (d) The American Arbitration Association's functions.
5. Scope of labor arbitration.
   (a) Settlement of grievances; "interpretation and application of the collective bargaining agreement."
   (b) Arbitration of new contract terms.
   (c) Difference between "rights" and "interests" cases.
   (d) Arbitration and management prerogatives.
   (e) Arbitration and the no-strike clause.
   (f) The reopening clause.
6. Publication of labor arbitration awards.

SUGGESTED READINGS:

Arbitrability, 1951 Report of the Committee on Improvement of Administration of Union-Employer Contracts, Section of Labor Relations Law, American Bar Association, in Readings on Labor Law, ed. by Charles A. Reynard, p. 172-203 (1955).

Beatty, Voluntary Arbitration: Its Legal Status and How It Works, 22 U. Kansas City L.R. 191 (1954).

Bennett, The General Legal Status of Labor Arbitration, 1 South Texas L. J. 26 (1954).

Braden, Problems in Labor Arbitration, 13 Missouri L. Rev. 143-169 (1948).

———, Current Problems in Labor-Management Arbitration, 6 Arb. J. (N.S.) 91-102 (1951).

Boles, Legal and Economic Significance of Labor Arbitration Awards, 5 Southwestern L. J. 393-422 (1952).

Copeloff, Management-Union Arbitration (1948).

Elkouri, How Arbitration Works (Washington, D. C., 1952).

Gregory and Katz, Labor Law: Cases, Materials and Comments (1948).

Handler and Hays, Cases and Materials on Labor Law (1952).

Lillard, State Arbitration Statutes Applicable to Labor Disputes, 19 Missouri L. R. 280-295 (1954).

Mayer, Arbitration and the Judicial Sword of Damocles, 27 Temple L. Q. 165-177 (1953).

Rosenman, Enforcement of Arbitration Clauses in Collective Bargaining Agreements in the Federal Courts, 23 George Washington L. Rev. 581-600 (1955).

Shulman and Chamberlain, Cases on Labor Relations (1949).

Smith, Significant Developments in Labor Law During the Last Half-Century, 50 Michigan L. R. 1265-1290 (1952).

Stanford, Compulsory Arbitration—A Solution for Industrial Decay, 13 U. of Pittsburgh L.R. 462-497 (1952).

Stein, Arbitration and the NLRA, 5 Labor L. J. 163-166, 206 (1954).

Summers, Judicial Review of Labor Arbitration, or Alice Through the Looking Glass, 2 Buffalo L. Rev. 1-27 (1952).

Taylor, The Voluntary Arbitration of Labor Disputes, 49 Michigan L. R. 787-804 (1951).

Updegraff and McCoy, Arbitration of Labor Disputes (1946).

Witte, Criteria in Wage Rate Determination, 1949 Wash. Univ. L. Q. 24-43.

Lecture No. XI — International Trade Arbitration

1. Introductory survey of foreign trade arbitration problems, as distinguished from domestic arbitration.

   Selection of arbitrators; the place of arbitration; the applicable law; enforcement of awards in another country.

2. The Western Hemisphere system of commercial arbitration. Inter-American and Canadian facilities.

SUGGESTED READING:

Kellor and Domke, Western Hemisphere Systems of Commercial Arbitration, 6 Univ. of Toronto L. J. 307-330 (1946).

3. The use of service agreements, as developed by the American Arbitration Association with special panels of international arbitrators, and a neutral agency for determining the place of arbitration.

Consideration to be given to the different arrangements with the International Chamber of Commerce, the London Court of Arbitration, the Associated Chambers of Commerce of Australia, the Association of Chambers of Commerce of South Africa, the Japan Commercial Arbitration Association, the Netherlands Arbitration Institute, and the cooperating commercial organizations in India: The Federation of Indian Chambers of Commerce and Industry, the Bengal Chamber of Commerce, and the Madras Chamber of Commerce.

4. The use of arbitration by foreign governments and the question of immunity of government agencies from enforcement proceedings.

(a) Survey of clauses in use by foreign trade purchasing commissions in the United States (to be distributed).

(b) The leading case of *Amtorg Trading Corp. v. Camden Fibre Mills, Inc.*, 304 N. Y. 519, 109 N.E. 2d 606 (1952): arbitration directed in Moscow.

Government of Kingdom of the Netherlands v. American Armament Corp., 58 N.Y.S. 2d 300 (1945): termination of war contracts.

(c) The use of private arbitration in inter-governmental economic relations, especially in the field of civil aviation by foreign-subsidized carriers.

SUGGESTED READINGS:

Note, Sovereign Immunity for Commercial Instrumentalities of Foreign Governments, 58 Yale L. J. 176 (1949).

Domke, Arbitration in Inter-Government Economic Relations, 7 Arb. J. (N.S.) 73-78 (1952); (reprint to be distributed).

5. The enforcement of foreign awards in the United States.

CASES:

Gilbert v. Burnstine, 255 N. Y. 348 (1931), and *Sargant v. Monroe,* 268 App. Div. 123 (N. Y. 1st Dept. 1944): enforcement of English awards.

6. The enforcement of American awards abroad.

CASES:

Judgment of the Supreme Court of Colombia of October 26, 1950, published in translation in 6 Arb. J. (N.S.) 159-162 (1951).

East India Trading Co. v. Carmel Exporters and Importers, (1952) 1 All England Law Reports 1053: enforcement in England of New York judgment entered upon award under Rules of the American Spice Trade Association in New York, 97 N.Y.S. 2d 556 (1950); note in 2 Am. J. of Comparative Law 238.

SUGGESTED READINGS:

Lorenzen, Commercial Arbitration—Enforcement of Foreign Awards, 45 Yale L. J. 39-68 (1935).

Domke, On the Enforcement Abroad of American Arbitration Awards, 17 Law and Contemporary Problems 545-566 (1952).

7. International agreements on enforcement of awards.

The Geneva Convention of 1927 to which neither the United States nor any other country of the Western Hemisphere is a party.

Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Economic and Social Council of the United Nations; Resolution of May 3, 1956.

SUGGESTED READING:

Nussbaum, Treaties on Commercial Arbitration, 56 Harv. L. Rev. 219-244 (1942).

8. Treaties of Friendship, Commerce and Navigation between the United States and eleven countries contain provisions for the re-

ciprocal enforcement of arbitration agreements and awards: Ireland (Jan. 21, 1950), Greece (Aug. 3, 1951), Israel (Aug. 23, 1951), Italy (Sept. 26, 1951, Supplemental to a treaty of Feb. 2, 1948), Denmark (Oct. 1, 1951), Japan (April 2, 1953), Federal Republic of Germany (Oct. 29, 1954), Haiti (March 3, 1955), Iran (Aug. 15, 1955), Netherlands (May 26, 1956), Nicaragua (Jan. 21, 1956).

SUGGESTED READING:

Walker, Commercial Arbitration in United States Treaties, 11 Arb. J. (N.S.) 68-84 (1956).

Lecture No. XII — Arbitration and the Conflict of Laws

1. The extra-territorial effect of modern arbitration statutes.

CASES:

Meacham v. Jamestown, Franklin & Clearfield R. R., 211 N. Y. 346, 105 N.E. 653.

Berkovitz v. Arbib & Houlberg, 230 N. Y. 261, 130 N.E. 288.

Matter of Inter-Ocean Products Co., 206 App. Div. 426, 201 N.Y.S. 536.

In re California Lima Bean Growers Assn., 9 N. J. Misc. 362, 154 Atl. 532.

Katakura Co., Ltd. v. Vogue Silk Hosiery Co., 307 Pa. 544, 161 Atl. 529.

SUGGESTED READINGS:

Heilman, Arbitration Agreements and Conflict of Laws, 38 Yale L. J. 617 (1929).

Lorenzen, Commercial Arbitration—International and Interstate Aspects, 43 Yale L. J. 716-765 (1934).

Phillips, Arbitration and Conflicts of Law: A Study of Benevolent Compulsion, 19 Cornell L. Q. 197-236 (1937).

Cohn, Commercial Arbitration and the Rules of Law. A Comparative Study, 4 Univ. of Toronto L. J. 1-32 (1941).

Commercial Arbitration and the Conflict of Laws, 56 Col. L. Rev. 902-915 (1956).

2. The Federal Arbitration Act and its relation to state laws.

CASES:

U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Corp., 222 F. 1006 (S.D. N. Y. 1915); *California Prune and Apricot Growers Corp. v. Catz American Corp.,* 60 F. 2d 788 (9th Cir. 1942; arbitration a procedural remedy).

Moyer v. Van-Dye-Way Corp., 126 F. 2d 339 (3rd Cir. 1942; enforcement of New York award in Pennsylvania).

Kentucky River Mills v. Jackson, 206 F. 2d 111 (6th Cir., 1953: law governing assignment of an award).

Pioneer Trust & Savings Bank v. Screw Machine Products, 73 F. Supp. 578 (D.C. Wisc. 1947); application of the law of the forum).

Miller v. American Insurance Co. of Newark, 124 F. Supp. 160 (D.C. Ark., 1954): application of Texas arbitration law (lex loci contractus) and not that of forum; notes in 53 Mich. L. Rev. 1178 (1955) and 1 So. Texas L. J. 403 (1955).

3. Enforcement of New York judgments entered upon ex parte awards in sister states.

CASES:

Mulcahy v. Whitehill, 48 F. Supp. 97 (D. Mass. 1943); *Marvlo Fabrics v. Jarus,* 87 F. Supp. 245 (W.D. Mo. 1949); *Hirsch Fabrics Corp. v. Southern Athletic Corp.,* 98 F. Supp. 436 (E.D. Tenn. 1951); *Ripley Fabrics v. Hymen,* 91 F. Supp. 1077 (N.D. Ill. 1950).

JUDICIAL DETERMINATION OF THE ARBITRABLE ISSUE

by Ralph E. Kharas and Robert F. Koretz

AN INTRODUCTORY COLLOQUY

Kharas: A lawyer whom we both know and who occasionally represents labor unions complained just the other day that he had lost two more cases in which the union sought to compel arbitration and was met by the employer's challenge in the courts that there was no arbitrable issue, although the collective agreement contained the usual provision for arbitration of grievances.

Koretz: Interesting, but I think I discern a tendency on the part of the New York courts to respond with judicial self-restraint, perhaps as a result of the series of papers which began appearing five years ago.[1] Those papers analyzed the role of the courts in labor arbitration, using principally the decisions of the New York courts

1. In chronological order, the following is a selection of these publications: Mayer, *Judicial "Bulls" in the Delicate China Shop of Labor Arbitration*, 2 LAB. L. J. 502 (1951): "Jealous of their prerogatives and jurisdiction, the courts measure the scope of the usual broad arbitration clause with judicial calipers and constantly come up with short measurements."; *Report of Committee on Arbitration of National Academy of Arbitrators*, 16 LAB. ARB. 994, 998 (1951): "under the New York statute the courts have, to some extent, considered it to be necessary, in passing upon arbitral jurisdiction, to examine the substantive positions taken by the parties."; *Freidin, Labor Arbitration and the Courts* 7 (1952): "Perhaps the most significant development in the law of enforcing arbitration agreements in recent years has been the doctrine improvised by the courts to permit a party to resist arbitrating, not because he did not agree to arbitrate, but because the court believes that the question sought to be arbitrated is answered, beyond peradventure, by the language of the contract."; Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFF. L. REV. 1, 10, 11 (1952): "The courts have not restricted themselves to determining whether the claim was so patently frivolous or unconscionable that the bringing of it was in bad faith and an abuse of the arbitration process. On the contrary they have spun fine lines of reasoning to prove ostensibly ambiguous clauses unambiguous, delved into obscure and equivocal negotiation history to discover the indisputable intent of the parties, and ingeniously manipulated overlapping and conflicting clauses to resolve all doubts. Far more clear than the meaning of the agreement is the fact that the court is engaged in doing the very job of interpretation assigned to the arbitrator."; Kharas, *Labor Arbitration—The Arbitrable Issue, N.Y.U. Fifth Annual Conference on*

under the New York Arbitration Law. Most of these studies were highly critical of what was deemed a trend toward excessive judicial intervention in the arbitration process, particularly in labor disputes.[2]

Kharas: If there is now a counter-trend, it would be important to point it out. Lawyers and others engaged in labor relations would naturally be interested. But has the *Cutler-Hammer* line of decisions been overruled?

Koretz: No, but—

Kharas: Actually there is a threat from two directions which may impair the usefulness of arbitration in labor disputes. One is the way in which courts give a restricted interpretation to contract clauses calling for arbitration of grievances arising under labor contracts. The other is the developing doctrine that if the grievance involves what would be a representation question or an unfair labor practice, the National Labor Relations Act has preempted such questions for decision by the N.L.R.B.[3] Many of us believe that arbitration makes a real contribution to mature labor relations. But parties will lose faith in the process as an expeditious solution if there are fre-

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Labor 633, 639, 640 (1952): (referring to the Cutler-Hammer case, *infra* note 14, and the Towne & James decision, *infra* note 16) "In both cases it seems clear that the court undertook to determine the obligation of the parties under the contract in order to declare that there was no arbitrable issue. But the parties had agreed to arbitrate disputes as to the application and interpretation of the contract."; Cox, *Legal Aspects of Labor Arbitration in New England*, 8 ARB. J. 5 (1953): discussing possible statutory treatment and proposing preliminary determination of the issue of arbitrability by the arbitrator, which would be a final determination under the usual arbitration clause, with provision, however, for parties to contract explicitly to reserve this issue for court determination; Gross, *Judicial Control of Arbitrator's Jurisdiction in New York*, 38 Corn. L. Q. 391 (1953); Hofstadter, *Labor Arbitrations in New York—With a Suggestion for the Establishment of Labor Courts*, 130 N.Y.L.J. 472, col. 1 (1953): defending the positions taken by the courts in New York, and suggesting the establishment of labor courts for the adjudication of disputes, jurisdiction over the parties to be obtained by consent only; Mayer, *Arbitration and the Judicial Sword of Damocles*, 4 LAB. L. J. 723 (1953); Note, *Judicial Innovations in the New York Arbitration Law*, 21 *U. of Chi. L. Rev.* 148 (1953); Rosenfarb, *The Courts and Arbitration*, N.Y.U. Sixth Annual Conference on Labor 161, 162 (1953): "the disconcerting tendency of the robed fraternity to expand the severely limited statutory function of judicial supervision of arbitration to absorb and perform tasks which in essence belong to the arbitrator."

2. See, *e.g.*, the papers of Mayer, Freidin, Summers, and Rosenfarb, *supra* note 1. Of the authorities cited in the preceding note, the only article which unequivocally disagrees with the criticism is that of Justice Hofstadter.

3. This problem of federal-state jurisdiction is beyond the scope of this paper. For a recent discussion, see Note, *Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice*, 69 *Harv. L. Rev.* 725 (1956).

quently grounds to block the process by court action whittling away the arbitrator's function.

Koretz: Of course even under the *Cutler-Hammer* line of decisions it was possible for employer and employee to circumvent judicial intervention by writing into the collective labor agreement a really broad arbitration provision.

Kharas: Those who are satisfied with that solution of the problem argue from the premise that labor arbitration is and should be a voluntary process. The parties to the collective agreement can write their own ticket. They can confine arbitrable grievances to the interpretation and application of the contract. They can delimit the arbitrator's powers by providing that he cannot modify or add to the obligations of the written contract. They can require that a grievance to be arbitrable must be filed within a stipulated time after the occurrence of the episode charged as a violation of the contract. They can by specific provision withdraw certain grievances from the arbitration process. Many contracts reserve questions such as wage rates, piece rates, job content, etc., for the grievance steps prior to arbitration, but make them non-arbitrable. And of course there are probably still a few contracts like the old Westinghouse contract in which there is no provision at all for the arbitration of grievances. On the other hand the patterns for very broad arbitration clauses are established in the decided cases.

Koretz: But the problem is not so easily solved. Arbitration clauses, as important as they are to the parties in the administration of the contract, are not apt to receive close attention during contract negotiations where the economic issues are of paramount importance. If we begin with the premise that arbitration of grievances arising under collective agreements performs a respectable and useful function in labor relations, then the real question becomes what the courts are doing with normal arbitration provisions. Such provisions make arbitration the final step in the grievance procedure for the solution of issues relating to the interpretation and application of the contract. If the courts are too restrictive in defining the arbitrable issue under the ordinary contract clause, they will defeat the reasonable expectation of the parties that their problems will be solved in a more informal, more expeditious and less costly forum than the courts and by arbiters chosen for their background of practical knowledge of labor relations.

Kharas: But you say you discern a trend away from the earlier

restrictive decisions of the New York courts. It should be useful to review the problem again.

Koretz: Whether the errors of the earlier cases have been corrected is still conjectural. But perhaps some insight into the sensitivity of the courts to criticism may be inferred.

I

Critics have suggested that in determining arbitrability the courts frequently have exceeded their statutory powers and interfered with sound labor relations. They have pointed out that the Arbitration Law, while permitting judicial intervention either before or after the dispute is submitted to the arbitrator, clearly circumscribes the extent of intervention. Thus, in proceedings to compel or stay arbitration the statute literally limits the courts to a determination of whether "a written contract providing for arbitration was made . . . and there was a failure to comply therewith."[4] In proceedings to vacate or modify, or to confirm an award, the statute states that the award may be vacated "where the arbitrators exceeded their powers," or where specified procedural improprieties are involved.[5] The award may be modified "where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award," or where other similar formal defects are present.[6] And the courts often have said, where intercession is requested prior to arbitration, that their sole function is to determine whether or not an agreement to arbitrate was made and whether there was a refusal to arbitrate.[7] Similarly, where intervention is requested after issuance of the award, the courts frequently have stated that they lack power to set aside the award for errors of law or fact.[8] Yet, according to some critics, the courts, while thus "giving lip service to self-abstention,"[9] have in many cases "preempted" or "usurped" the duties of the arbitrator by actually making determinations of the merits of the controversy. It is said that this is done by the use of doctrines, formulas, or dogmas

4. *N. Y. Civ. Prac. Act* § 1450.
5. *N. Y. Civ. Prac. Act.* § 1462.
6. *N. Y. Civ. Prac. Act* § 1462-a.
7. *E.g.*, Mencher v. B. & S. Abeles & Kahn, 274 App. Div. 585, 590, 84 N.Y.S.2d 718, 723 (1st Dep't 1948).
8. *E.g.*, Matter of Motor Haulage v. International Brotherhood of Teamsters, 272 App. Div. 382, 383, 71 N.Y.S.2d 352, 353 (1st Dep't 1947).
9. Mayer, *Arbitration and the Judicial Sword of Damocles*, 4 LAB. L. J. 723 (1953).

variously labeled "scope," "no dispute," "bona fide dispute," "nothing to arbitrate," or "jurisdiction."[10]

In essence, the argument is this: Starting with the incontestable principle that arbitration can not be compelled unless the parties have agreed to it, the courts not only have determined such questions as whether a valid contract exists, whether it contains an arbitration provision, and whether the alleged dispute is covered by the arbitration clause,[11] but, in proceedings to compel or stay arbitration, have gone beyond this and determined that the grievance was not arbitrable because it was beyond the "scope" of the collective agreement or because under the entire agreement there was actually "no dispute," or no "bona fide dispute," or "nothing to arbitrate." Again, in proceedings to vacate or confirm an award, there have been numerous holdings that an arbitrator has exceeded his "jurisdiction" where he has misinterpreted what the court deems the plain meaning of the contract. All this not only ignores the limitations imposed by the statute, but "has considerably diluted the unique contributions arbitration is capable of making to industrial stability."[12] According to a leading critic, these results have stemmed from "two major misconceptions which permeate a major portion of the court decisions. One is the misconception that a collective agreement is a common contract and the other is the misconception that the words and provisions in collective agreements must carry common and fixed meanings. Both of these spring from the courts' apparent inability to recognize the strangeness of this world, and both result in an assumption of authority which is exercised with extreme awkwardness."[13]

This position has been documented by many citations; a few illustrations will suffice for present purposes.

Of the critics' targets, none has been cited more frequently than *International Association of Machinists v. Cutler-Hammer, Inc.*,[14] the "keynote case"[15] of the "no dispute" or "bona fide dispute" or "nothing to arbitrate" doctrine. In this case, the collective agreement

10. These phrases are particularly emphasized in Freidin, Summers, and Rosenfarb, *supra* note 1.
11. As we understand them, the critics do not contend that the Arbitration Law precludes the courts from construing the arbitration clause itself to determine whether it applies to the matter in controversy. They do, however, raise doubts as to the wisdom of permitting the court, rather than the arbitrator, to determine preliminarily this question. See, *e.g.*, Freidin, *supra note* 1, at 4-6, 47.
12. Freidin, *supra* note 1, at 4.
13. Summers, *supra* note 1, at 20.
14. 297 N. Y. 519, 74 N.E.2d 464 (1947).
15. Freidin, *supra* note 1, at 7.

provided for a bonus of 6 per cent for the last six months of 1945 and that "The Company agrees to meet with the union early in July 1946 to discuss payment of a bonus for the first six months of 1946." The Company took the position that it had met its obligation by discussing the matter with the Union. The Union asserted that the parties had agreed upon payment of a bonus, leaving only the amount to be discussed, and demanded arbitration pursuant to a clause of the agreement providing for arbitration of "any dispute . . . as to the meaning, performance, non-performance, or application of the provisions of this agreement. . . ." The Union's motion to compel arbitration was denied by the Appellate Division which, in reversing the lower court, reasoned:

> "The mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words can not make an arbitrable issue. It is for the court to determine whether the contract contains a provision for the arbitration of the dispute tendered and in the exercise of that jurisdiction the court must decide whether there is such a dispute. *If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.*"[16]

The Court of Appeals affirmed without opinion, but not without dissent.[17] However, the highest New York court soon made express its agreement when, in approving an order staying arbitration in the *General Electric* case,[18] it stated: "If there is no real ground of claim,

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16. To like effect is Application of Towne & James, Inc., 183 Misc. 181, 48 N.Y.S.2d 81 (Sup. Ct. 1944).
17. Two judges dissented, taking the position that:
    "A claim may be 'so unconscionable or a defense so frivolous' as to justify the court in refusing to order the parties to proceed to arbitration . . ., but I do not so regard the claim here asserted. I have difficulty in concluding, as respondent urges, that reasonable men cannot differ as to the meaning of the provision in question. While I see that as a possible construction, I do not consider it the only one. It may well be argued, and in good faith, that in the light of surrounding circumstances and of experience in the industry, and, indeed, in this very business, respondent company agreed that a bonus would be paid—at least where the company's business warranted—and that it would discuss with the employees the amount of payment, ie., 'payment of a bonus.'
    "If there is a possibility of such a construction, the court should not remove the controversy from the sphere of arbitration, particularly when the applicable arbitration clause—'if any dispute shall arise . . . as to meaning, performance, non-performance or application of the provisions of this agreement'—is so broad.
    "In short, I think that there is something to arbitrate and the order should be reversed." 297 N. Y. at 520-21, 74 N.E.2d at 464-65.
18. General Electric Co. v. U.E.R., 300 N. Y. 262, 90 N.E.2d 181 (1949).

the court may refuse to allow arbitration, although the alleged dispute may fall within the literal language of the arbitration agreement."[19]

An analogous line of cases, representative of the so-called "scope" doctrine, is illustrated by *Matter of Belding Heminway Co.*[20] The company was a member of an employers association in New York City having a closed shop contract with the union. When the company established a plant in New Jersey, the union contended that this had been done to avoid performance of the contract and sought to arbitrate the question whether the closed shop provisions applied to employees in the New Jersey plant. On the company's motion to stay arbitration, the Court of Appeals held that the issue posed by the union "was a debatable question which called for a decision as to the scope of the collective bargaining agreement between the parties. This question, we think, was for the court, not for the arbitrators."[21]

It has been pointed out that similar questions arise, though much less frequently, *after* arbitration upon motion to confirm or vacate an award.[22] Illustrative of such cases is another favorite *bête noire* of the critics, *Western Union Telegraph Co. v. American Communications Association.*[23] In this case, employees of Western Union in New York City refused to handle messages transmitted by other companies whose fellow union employees were on strike. The company discharged the employees on the ground that they had violated the no-strike clause of the collective agreement. The arbitrator ordered reinstatement, reasoning that in view of the usage in the trade, the employees had not engaged in a "stoppage" by refusing to handle "struck" goods. The Court of Appeals ruled that the award must be set aside, one ground being th t the arbitrator had exceeded his powers by construing the language of the agreement in contravention of the unambiguous language of the no-strike pledge.[24] Of this case it is said that "Since the power to interpret does not include the power to misinterpret, any misinterpretation falls outside the juris-

19. *Id.* at 264, 90 N.E.2d at 182. See also General Electric Co. v. U.E.R., 196 Misc. 143, 91 N.Y.S.2d 724 (Sup. Ct. 1949).
20. 295 N. Y. 541, 68 N.E.2d 681 (1946).
21. *Id.* at 543, 68 N.E.2d at 681.
22. *Report of Committee on Arbitration of National Academy of Arbitrators,* 16 LAB. ARB. 994, 997 (1951).
23. 299 N. Y. 177, 86 N.E.2d 162 (1949).
24. An alternative ground of decision was that the award would permit conduct by employees contrary to public policy as expressed in the state's penal laws.

diction of the arbitrator."[25]

The alleged trend illustrated by the above decisions has been considered serious enough to evoke numerous suggestions for reform. All critics cry out for judicial restraint, especially in judicial proceedings prior to arbitration. Nearly all urge the incorporation in the collective agreement of "clauses which would bar interference by the courts with the process of arbitration."[26] Some would go farther and incorporate into arbitration statutes further limitations upon the powers of the courts; in particular, it is urged that the power of the courts to intervene prior to the award be curtailed or denied.[27]

II

Following closely upon the wave of criticism of the New York courts came the decision of the Court of Appeals in *Matter of Bohlinger and National Cash Register Co.*,[28] decided on July 14, 1953. The employer discharged two employees because they had worked for a competing company during their off hours. The union, claiming that a dispute had arisen over such discharge without notice or warning, demanded arbitration pursuant to a collective agreement providing that "any dispute between the parties with reference to any matter not provided for in this Contract . . . shall be referred to a Board of Arbitration . . ." The employer moved to stay arbitration, contending that because the agreement failed to provide whether the employer shall have the right to discharge without notice and without cause, the agreement retained for the employer his common-law right to discharge at will. Cited in support of the employer's position were, *inter alia*, the *Cutler-Hammer, Belding Heminway,* and *General Electric* decisions mentioned above. The union argued that as the agreement defined "discharge" and failed to secure any right to discharge, any discharge gave rise to an arbitrable dispute. The Court of Appeals, two judges dissenting, held that an arbitrable issue was presented, reasoning that:

> "We need not resolve that dispute as to how the collective bargaining agreement should be construed because its mere statement demonstrates conclusively that under the broad language of the arbitration clause, the opposing contentions of the parties ought to be resolved by the arbitrators in respect of its interpretation."[29]

25. Summers, *supra* note 1, at 8.
26. Mayer, *Arbitration and the Judicial Sword of Damocles,* 4 LAB. L. J. 723, 773 (1953).
27. *Ibid;* Cox, *supra* note 1, at 19; Freidin, *supra* note 1, at 6, 47.
28. 305 N. Y. 539, 114 N.E.2d 31 (1953).
29. *Id.* at 542-43, 114 N.E.2d at 32.

The *Bohlinger* case may well mark a turning point in the trend of decision. It is true that the Court of Appeals did not purport to overrule precedents or otherwise depart from prior principles. And the case can be distinguished from earlier cases on the basis of the broad arbitration clause of the agreement.[30] Yet, the decision has evoked the comment that it evidences "that the judicial mind is not entirely settled with regard to issues" of the type presented in *Belding Heminway* and *Cutler-Hammer*.[31] And in a decision of the Supreme Court of Washington, in which application of the "no dispute" doctrine of *Cutler-Hammer* was urged, the court, rejecting the contention, stated that "the force of that decision has been weakened by the case of Matter of Bohlinger."[32]

It is our belief that a considerable body of recent decisions supports the view that the New York courts are reversing the trend—if indeed there was such a trend—toward increasing intervention in the arbitration process. In the period of nearly three years which has elapsed since the *Bohlinger* case, no decision of the Court of Appeals has accepted a plea of non-arbitrability in a labor arbitration case. While the decisions are few in number, they have given short shrift to such contentions. Thus, the court has affirmed without opinion decisions of the Appellate Division holding arbitrable disputes as to whether a demand for arbitration was made within a contractual thirty-day period,[33] and as to whether a discharge was violative of an agreement in which the arbitration clause excluded "matters which are within the customary province of the employer," and which reserved to the employer the right to hire and discharge em-

30. Recent Decision, 5 *Syracuse L. Rev.* 104, 106 (1953).

31. MacDonald, Stein and Taplitz, *Management Rights and the Arbitration Process, N.Y.U. Eighth Annual Conference on Labor* 303, 343-44 (1955).

32. Greyhound Corp. v. Division 1384, 271 P.2d 689, 695-96 (Wash. 1954). The further comments of the Washington court on the Cutler-Hammer case merit quotation: "Where union and employer, in very clear language, have by agreement chosen an arbitration board as the ultimate forum for the resolution of disputes, there is a very real question as to whether the courts should impose upon the parties the burden of showing in court or in a judicial forum that a dispute is bona fide as a condition to the right of either party to submit the matter to arbitration. In deciding whether a dispute is bona fide, as was done in the Cutler-Hammer case, . . . there is the danger that a court, because of a very liberal or mistaken impression of its function, may, for practical purposes, become the forum for the determination of the dispute. Anything less than a cautious application of the rule would permit a party to an arbitration to choose between a judicial forum and an arbitration forum for the settlement of a controversy, notwithstanding his solemn agreement in writing to submit all disputes to arbitration."

33. Matter of Local Union 516, UAW-CIO, 307 N. Y. 744, 121 N.E.2d 551 (1954), *affirming* 283 App. Div. 180, 127 N.Y.S.2d 166 (4th Dep't 1954).

ployees in accordance with the requirements of the business.[34] And, most recently, it has affirmed the order denying a stay of arbitration in the *Teschner* case,[35] discussed in detail below.

Similarly, the atmosphere in the Appellate Division has been consistently sympathetic to the arbitration process. Witness two recent decisions of the First Department in proceedings to compel or stay arbitration, both involving the familiar type of arbitration clause limiting arbitration to disputes relating to the collective agreement. In the *Teschner* case the agreement contained a clause granting the employer, a small textile jobber having but one employee, "the absolute right to go out of business at any time during the term of the agreement and such right shall not be questioned by the Union." Shortly after the agreement was executed, allegedly because of poor business conditions the employer surrendered his lease, disposed of his stock, and discharged the employee. The union demanded arbitration,[36] asserting that the employer in fact had not gone out of business but had continued through the device of a newly formed corporation. The court, two justices dissenting, affirmed the denial of the employer's application for a stay, reasoning that:

> "Since the question of whether petitioner has in fact gone out of business bears directly on the subject matter of the demand, and since it arises from an act of a party performed subsequent to the making of the contract, there is presented an issue which lies exclusively within the jurisdiction of the arbitrators."[37]

In *Matter of Potoker*[38] the union moved to compel arbitration[39] of claims for severance, accrued vacation, unpaid overtime, holiday, notice of dismissal and sick leave pay provided for in the agreement. Special Term held that the union had repudiated the agreement by

34. Matter of Cohen, 306 N. Y. 839, 118 N.E.2d 904 (1954), *affirming* 282 App. Div. 939, 126 N.Y.S.2d 194 (1st Dep't 1953).
35. Matter of Teschner, 309 N. Y. 972, 132 N.E.2d 333 (1956), *affirming* 285 App. Div. 435, 137 N.Y.S.2d 901 (1st Dep't 1955).
36. The agreement provided for arbitration of ". . . all complaints, controversies, disputes, and grievances arising between the Employer and the Union concerning the interpretation, operation, application or performance of the terms of this agreement, or any complaint, controversy, dispute or grievance involving a claimed breach of any of the terms or conditions of this agreement . . ."
37. 285 App. Div. at 439, 137 N.Y.S.2d at 905. The dissenting justices were of the opinion that the clause giving the employer the right to go out of business meant "that there would be no right to arbitration after the employer went out of business," and that the factual issue of whether he had in fact so ceased was a matter not for arbitration, but for trial.
38. 286 App. Div. 733, 146 N.Y.S.2d 616 (1st Dep't 1955).
39. The arbitration clause provided that "any dispute, claim, grievance or difference arising out of or relating to this agreement shall be arbitrated."

calling a strike, and that all claims based upon subsequent conduct—specifically, the claims for severance and notice of dismissal pay—were not arbitrable. Upon appeal, the Appellate Division reversed, holding that all claims presented arbitrable issues. Under the arbitration clause, even the issue as to whether the contract was terminated is arbitrable. And "any inquiry . . . to determine whether or not . . . any claim arises after the termination of the contract goes to the merits" and is therefore within the arbitrators' province.

Noteworthy in the above decisions is the reliance by the court upon provisions in the collective agreement "specifically prescrib[ing] arbitration as the method for determination of all disputes."[40] Thus, in the *Teschner* case, the court stressed the following provisions which "implemented" the arbitration clause:

> "(D) The arbitration procedure herein set forth is the sole and exclusive remedy of the parties hereto and the workers covered hereby, for any claimed violations of this contract, and for any and all acts or omissions claimed to have been committed by either party during the term of this agreement, and such arbitration procedure shall be (except to enforce, vacate, or modify awards) in lieu of any and all other remedies, forums at law, in equity or otherwise which will or may be available to either of the parties. . . ."[41]

In the *Adler* case,[42] a proceeding to vacate an award, the same court exhibited a like attitude in dealing with a problem which previously had given rise to conflicting decisions[43]—namely, the power of the arbitrator in a discipline case to modify a penalty imposed by management upon an employee found guilty of misconduct. In this case, the parties had submitted to the arbitrator the question: "Was the discharge . . . proper, under the contract?" The arbitrator found the employee guilty of misconduct, but not sufficient to justify dismissal, and issued an award requiring reinstatement and fining the employee by withholding two weeks' back pay. The court, one justice dissenting, upheld the award as within the arbitrator's power, reasoning that although the issue of reinstatement was not

40. Matter of Potoker, 286 App. Div. 733, 736, 146 N.Y.S.2d 616, 619 (1st Dep't 1955).
41. Application of Teschner, 285 App. Div. 435, 439, 137 N.Y.S.2d 901, 905 (1st Dep't 1955). See also Newspaper Guild v. Hearst Consol. Publishers, 27 CCH Lab. Cas. ¶ 69060 (Sup. Ct. 1955), *aff'd mem.*, 286 App. Div. 805, 143 N.Y.S.2d 619 (1st Dep't 1955). *But cf.* Livingston v. Tel-Ant Electronic Co., 138 N.Y.S.2d 111 (Sup. Ct. 1955).
42. Samuel Adler, Inc. v. Local 584, IBT, 282 App. Div. 142, 122 N.Y.S.2d 8 (1st Dep't 1953).
43. See Summers, *supra* note 1, at 17.

expressly submitted, it was "necessarily implicit in submitting issues that could and did result in a finding of improper discharge," and that since the arbitrator had power to order reinstatement, "there is no reason why a condition could not be attached."

Illustrations of the approach reflected by the above cases can be multiplied. Thus, the Appellate Division has affirmed decisions holding arbitrable such disputes as whether a new category of employees was covered by a collective agreement,[44] or whether a tentative denial of security clearance constitutes "just cause" for discharge.[45] Citation suffices for further similar examples.[46]

This is not to say that the doctrines which have irritated the critics have lapsed into desuetude. While state Supreme Court judges in a majority of cases have rejected contentions based upon these doctrines,[47] the phrases "no dispute," "bona fide dispute," "beyond dispute," "nothing to arbitrate," and the like, often followed by citations to *Cutler-Hammer, General Electric, Belding Heminway* and similar authorities, continue to appear in decisions denying arbitrability. Thus, the New York Supreme Court has held that under an agreement, which contained a management functions clause and

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44. Kraft Foods Co. v. Coughtry, 282 App. Div. 1090, 126 N.Y.S.2d 922 (3d Dep't 1953).
45. Fitzgerald v. Sperry Gyroscope Co., 283 App. Div. 1036, 131 N.Y.S.2d 873 (1st Dep't 1954), *affirming* 25 CCH Lab. Cas. ¶ 68302 (Sup. Ct. 1954). The Appellate Division stressed the fact that "the denial of clearance was tentative and not final" and cautioned: "It may be that questions of law and public policy will survive the arbitration, and as to which the arbitrator's award may not be conclusive." Presumably the court had in mind its earlier decision in Sperry Gyroscope Co. v. Engineers' Assn., 279 App. Div. 630, 107 N.Y.S.2d 800 (1st Dep't 1951), *aff'd mem.*, 304 N. Y. 582, 107 N.E.2d 78 (1952), in which it was held that a final denial of clearance to a discharged employee left nothing to arbitrate. This decision is criticized in Mayer, *Arbitration and the Judicial Sword of Damocles*, 4 LAB. L. J. 723, 725-26 (1953).
46. See Wagner v. Russeks Fifth Avenue, Inc., 281 App. Div. 825, 119 N.Y.S.2d 269 (1st Dep't 1953); Johnson v. Petrillo, 282 App. Div. 795, 123 N.Y.S.2d 1 (3d Dep't 1953); Fay v. Signal-Stat Corp., 281 App. Div. 907, 120 N.Y.S.2d 130 (2d Dep't 1953); Application of Stewart Stamping Corp., 285 App. Div. 953, 138 N.Y.S.2d 327 (2d Dep't 1955).
47. We have examined some 48 decisions issued in supreme court since about July 1952 in which it was contended either that no arbitrable dispute had arisen within the meaning of a valid arbitration provision, or that the arbitrator had exceeded his powers thereunder. In 30 of these, the contention was rejected: in 18, the contention was upheld. The following are examples of recent decisions in which the courts adhered to the principle of self-abstention which the critics urge: Matter of Hotel Concord, East Point Hotels, Inc., 140 N.Y.S.2d 848 (Sup. Ct. 1955); Fay v. Farber & Shlevin, Inc., 145 N.Y.S.2d 722 (Sup. Ct. 1955); Publishers' Association of N.Y. City v. N.Y. Newspaper Printing Pressmen's Union No. 2, 28 CCH Lab. Cas. ¶ 69424 (Sup. Ct. 1955); Halbfinger v. New York Times Co., 29 CCH Lab. Cas. ¶ 69766 (Sup. Ct. 1956).

apparently no express limitation on the employer's right to discharge, and which limited arbitration to disputes concerning the application or interpretation of the agreement, the union's claim that a discharge was too severe a penalty did not present an arbitrable issue.[48] Similar is a case in which the employer allegedly had granted wage increases within contractual rate ranges to remove inequities and, the union claimed, thereby created further inequities, perverted the merit review procedure of the agreement, disregarded the obligation to discuss salary schedule deviations, and neglected the bargaining agent. Granting a motion to stay arbitration, the court held that the union's demand for increases for employees not previously included "is beyond the arbitral machinery and it must be left for negotiation of wage schedules which may take effect upon expiration of the present agreement. . . ."[49] Another court, after detailed examination of several contractual provisions relevant to a claim of holiday pay for certain employees, thought that "the intent of the parties to exclude . . . [these] employees from the right to pay . . . is so clear and free from doubt that no genuine arbitrable issue exists."[50] And a claim that an employer had unjustly accused an employee of contract violation was held not arbitrable under a clause limiting arbitration to disputes concerning interpretation or application of the agreement, application of company rules and termination of services.[51]

Further examples of the "no dispute" doctrine may be found where the union sought arbitration of a claim for severance pay in a situation in which the contract did not curtail the employer's right to discontinue business and made no provision for severance pay if he discharged employees upon doing so;[52] where the union claimed that the employer had violated the agreement by contracting out work, notwithstanding that the employer had complied with a provision requiring it merely to "inform" the union of its intention to do so and "explain" why it considered it necessary and desirable;[53]

48. Stowe v. Aircooled Motors, Inc., 204 Misc. 228, 126 N.Y.S.2d 42 (Sup. Ct. 1953).
49. Taft v. Sperry Gyroscope Co., 127 N.Y.S.2d 61, 62 (Sup. Ct. 1953). In another decision of the same name, the court held that under an agreement giving the employer sole discretion in granting merit increases, a claim, unsupported by proof, that the company had granted general increases in the guise of merit increases did not present an arbitrable issue. 25 CCH Lab. Cas. ¶ 68180 (Sup. Ct. 1954).
50. Hall v. Sperry Gyroscope Co., 130 N.Y.S.2d 505, 510 (Sup. Ct. 1954).
51. Russ v. Prudential Ins. Co., 130 N.Y.S.2d 94 (Sup. Ct. 1954).
52. Retail Drug Employees Union v. Berk-Stevens, Inc., 28 CCH Lab. Cas. ¶ 69344 (Sup. Ct. 1955); Lynn Pharmacy, Inc. v. Retail Drug Employees Union, 26 CCH Lab. Cas. ¶ 68695 (Sup. Ct. 1954).
53. Matter of Woytowicz, 26 CCH Lab. Cas. ¶ 68813 (Sup. Ct. 1954).

where the union sought arbitration of alleged controversies concerning the manner in which certain work should be performed in the face of a management-functions clause not specifically limited by other relevant provisions of the agreement;[54] where the employer sought arbitration of a claim that the union had breached the agreement by dispatching under-aged applicants for employment although the agreement did not require the union to investigate the qualifications of applicants referred by it and which retained for the employer exclusive control over hiring;[55] where the union sought to arbitrate the question whether an employee had been discharged for cause after a referendum vote in the unit of employees involved which approved the discharge;[56] and where the union claimed that an employer, by closing its plant and having the work performed by wholly-owned subsidiaries, had breached contractual provisions that the employer would not lock out its employees and would not, without good cause, have products presently produced by its employees manufactured for it "by other firms, when its employees were not working full time."[57]

III

Assuming that the critics were correct in their contentions that the courts have excessively intervened in labor arbitration, we believe that the foregoing indicates a favorable counter-trend. We recognize that the period surveyed is too brief to provide the basis for categorical assertion. We are aware that there are unarticulated variables involved in labor arbitration that make conclusions drawn from limited experience highly tentative. We also recognize that the New York courts have not purported to depart from precedent, and that there indeed have been some decisions which, if taken at face value, are egregious examples of judicial usurpation of the arbitrator's function in labor matters.

Nevertheless, we believe that we have pointed to indicia which strongly support our conclusion. Foremost has been the attitude of

54. Carborundum Co. v. Swisher, 134 N.Y.S.2d 661 (Sup. Ct. 1954).
55. Livingston v. Tel-Ant Electronic Co., 138 N.Y.S.2d 111 (Sup. Ct. 1955). This case is adversely criticized in Rose, *Arbitration and the Courts, N.Y.U. Eighth Annual Conference on Labor* 351, 355, 361-62 (1955).
56. N. Y. Times Co. v. Newspaper Guild of N.Y., 29 CCH Lab. Cas. ¶ 69625 (Sup. Ct. 1955).
57. Acme Backing Corp. v. District 65, 29 CCH Lab. Cas. ¶69631 (Sup. Ct. 1955). For further recent examples, see Royal McBee Corp. v. Gough, 29 CCH Lab. Cas. ¶ 69698 (Sup. Ct. 1956); Boorum & Pease Co. v. Paper Workers, Local 292, 29 CCH Lab. Cas. ¶ 69727 (Sup. Ct. 1956).

the appellate courts. While the Court of Appeals has recently been called upon to decide but few cases in this area, and its *Bohlinger* decision upholding arbitrability is susceptible of narrow application, the fact remains that the highest court has given the critics no cause for complaint during the period surveyed. And the decisions of the Appellate Division should provide some cause for rejoicing. Its decisions have been more numerous than those of the Court of Appeals, and have consistently upheld arbitrability and arbitration awards, frequently reversing lower court opinions to the contrary. In particular, we are impressed by the indication of the *Teschner* and *Potoker* decisions that the courts will heed the parties' desires for judicial abstinence if they but express their intention with sufficient clarity. And even in the lower courts, if the counting of decisions be any guide,[58] the numerical preponderance of decisions is on the side of arbitrability.[59]

It is our surmise, then, that most judges read the law reviews. If our brief survey be any indication, the pleas for self-restraint have been widely honored. And if this "trend" continues, we see little need for legislative reform. Sympathetic understanding of present statutory limitations and of the nature of labor arbitration, together with a willingness to accept contractually imposed limitations on judicial intervention, will leave the parties substantially free to "write their own ticket." No more legitimately can be demanded.

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58. See Summers, *supra* note 1, at 13.
59. See note 47 *supra*.

ENFORCING ETHICAL CONDUCT IN COMMERCIAL ART

by Tran Mawicke

The Joint Ethics Committee of the Society of Illustrators, the New York Artists Guild, and the New York Art Directors Club, was formed in 1945 to combat a growing number of abuses, misunderstandings, and cases of ethical misconduct in the field of applied art.

In many meetings held over a period of several years, a Code of Fair Practice was formulated, developed from original codes of the Artists Guild and the American Association of Advertising Agencies.

Inasmuch as the field of commercial art may be unfamiliar to many, it might be advisable here to state our Code, so that references in this article may be studied against a background of principle.*

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*RELATIONS BETWEEN ARTIST AND ART DIRECTOR

1) Dealings between an artist or his agent and an agency or publication should be conducted only through an authorized art director or art buyer. 2) Orders to an artist or agent should be in writing and should include the price, delivery date and a summarized description of the work. In the case of publications, the acceptance of a manuscript by the artist constitutes an order. 3) All changes and additions not due to the fault of the artist or agent should be billed to the purchaser as an additional and separate charge. 4) There should be no charge for revisions made necessary by errors on the part of the artist or his agent. 5) Alterations to artwork should not be made without consulting the artist. Where alterations or revisions are necessary and time permits and where the artist has maintained his usual standard of quality, he should be given the opportunity of making such changes. 6) The artist should notify the buyer of an anticipated delay in delivery. Should the artist fail to keep his contract through unreasonable delay in delivery, or non-conformance with agreed specifications, it should be considered a breach of contract by the artist and should release the buyer from responsibility. 7) Work stopped by a buyer after it has been started should be delivered immediately and billed on the basis of the time and effort expended and expenses incurred. 8) An artist should not be asked to work on speculation. However, work originating with the artist may be marketed on its merit. Such work remains the property of the artist unless paid for. 9) Art contests except for educational or philanthropic purposes are not approved because of their speculative character. 10) There should be no secret rebates, discounts, gifts or bonuses to buyers by the artist or his agent. 11) If the purchase price of artwork is based specifically upon limited use and later this material is used more extensively than originally planned, the artist is to receive

The Joint Ethics Committee comprises three or more appointed members from each of the parent bodies, but operates almost autonomously under a budget equally subscribed by them. Meetings are held monthly or oftener if necessary, under a chairman elected by the Committee itself.

Cases for consideration are presented in writing. If within the scope of the Committee, the complaint is presented to the defendant, with the offer of mediation or arbitration of the dispute. Under our rules, mediation takes place at an informal meeting, with an impartial panel of mediators who try to bring the disputants to an agreement. Although there is nothing binding upon either party in this procedure, a clarification of the issues is generally sufficient to settle the matter satisfactorily. Should this fail to happen, arbitration is suggested. Frequently, if the matter seems serious enough, arbitration is offered first.

Our arbitrations are held in compliance with the Arbitration Law of the State of New York. We are able to fill our arbitration panels with exceptionally qualified men in the field, and while usually a panel of three is enough, if necessary a panel can be of any size to meet the desires of the parties involved.

Legal counsel is always available to the Committee, insuring that the matters it deals in are completely within its province. Disputes of a legal nature are not considered, and no legal advice is ever of-

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adequate additional remuneration. 12) If comprehensives or other preliminary work are subsequently published as finished art, the price should be increased to the satisfaction of artist and buyer. 13) If preliminary drawings or comprehensives are bought from an artist with the intention or possibility that another artist will be assigned to do the finished work, this should be made clear at the time of placing the order. 14) The right of an artist to place his signature upon artwork is subject to agreement between artist and buyer. 15) There should be no plagiarism of any creative artwork. 16) If an artist is specifically requested to produce any artwork during unreasonable working hours, fair additional remuneration should be allowed. 17) An artist entering into an agreement with an agent or studio for exclusive representation should not accept an order from, nor permit his work to be shown by any other agent or studio. Any agreement which is not intended to be exclusive should set forth in writing the exact restrictions agreed upon between the two parties. 18) All illustrative artwork or reproductions submitted as samples to a buyer by artists' agents or art studio representatives should bear the name of the artist or artists responsible for the creation. 19) No agent or studio should continue to show the work of an artist as samples after the termination of their association. 20) After termination of an association between artist and agent, the agent should be entitled to a commission on work already under contract for a period of time not exceeding six months. 21) Original artwork furnished to an agent or submitted to a prospective purchaser shall remain the property of the artist and should be returned to him in good condition. 22) Interpretation of this code shall be in the hands of the Joint Ethics Committee and is subject to changes and additions at the discretion of the parent organizations.

fered by the Committee. There is no charge to anyone for our services, the cost being borne by the founding organizations. Membership in these bodies is not required to bring an action before the Committee, as it has been the clear intention of the parent groups to bring some order and standards to their field of endeavor.

Basically, the Joint Ethics Committee represents a tremendous number, if not the majority, of the people engaged in commercial art in New York City. Further, the National Society of Art Directors has adopted the Code as their own, and made subscription to it a condition of membership. From the Art Directors alone, this represents almost 3000 people in the United States and Canada working under a uniform set of standards. Ethics committees have formed or are forming in Chicago, Philadelphia and Montreal, basing their actions upon the original Code, but with varying participating parties of professional and trade bodies in those places. In May, 1954, the Code and Committee were discussed in a London art publication. It is clear then that these principles of fair practice are spreading in this country and abroad, and with them, the recourse to arbitration as a means of settling disputes relative to them. Meanwhile, a body of precedents and understandings has grown governing the conditions under which this profession works. Creative art is a mercurial thing, and the fine shades of interpretation involved in a dispute are surely subjects only for experts to resolve. The fact that the Committee can sometimes quickly and easily settle these matters, and has brought about a degree of order where previously there was chaos, has more than justified its existence.

While we have endeavored to keep our business confidential it would seem proper, for the sake of this article, to describe in more detail some of our cases.

A typical year brings about 500 complaints to our attention. Of this number, many prove to be outside the scope of the Committee. Others are resolved by a single letter. We are not bill collectors, and fortunately this type of appeal is dwindling as education progresses. The usual monthly agenda consists of between twenty and thirty cases in various stages of review. Some advertising agencies state on their art purchase orders that any disputes will be settled by arbitration. Many art buyers do not, however, and the reluctance of parties to accept our offers of arbitration occasionally delays what we like to consider our usual dispatch. For this reason some incidents drag out unduly. In other cases the persons involved have

already agreed that this Committee shall arbitrate for them, which leads to very quick action.

As stated earlier, there are so many nuances of meaning in creative art that it would be hard to tell in which category the majority of our work falls, because cases frequently involve more than one clause of the Code. The principle of limited use is relatively new, and is a constant source of misunderstanding. Some of our more notable cases centered around this point. The fact that this idea is an accepted practice in radio, television, music and writing, makes more surprising the lack of comprehension of the principle in our field. Relations between artists and their representatives or salesmen are a constant irritant. While we are not appraisers, we must at times try to establish some value for creative effort.

A few typical cases may be cited.

Magazine A commissioned an artist to make a painting. Magazine B desired to use this illustration in a page layout of various pictures, and requested Magazine A's permission to do so. A referred B to the artist, who was agreeable but asked his usual fee for second rights, which was three times what B was willing to pay. B used the picture anyway and when presented with a bill from the artist, maintained that permission had been granted by A, under the opinion that said picture was completely owned by A, and that A could use or dispose of same in any way. The Committee was appealed to and offered to arbitrate the matter. Before this occurred, B settled with the artist, but the case was noteworthy because of its implications. Clause 11 of the Code clearly states the Committee's position on this point.

A recent arbitration involved an artist and agent over a matter of commissions. The artist had been introduced to a client by the agent and given a job to do. This work was satisfactory, but two months passed, and no more work being forthcoming, the artist saw the client himself and immediately started a very profitable relationship. The agent heard of this and demanded his commission for all the work done. The artist offered slightly less than half the usual commission, and since neither could agree, called on the Committee to arbitrate. After the evidence was in, an award was made to the agent of one half his usual commission for a period of six months, dating from the original work. This award was based on Clause 20 of the Code, and as developed by the arbitration, the degree of effort put forth by the agent.

Quite a few cases have arisen around a difficult interpretive

point. Clauses 3, 5, and 7 of the Code bear on it, but none completely covers this. An art buyer will commission an artist to do some work and upon receiving it will request changes. These being made, the buyer will then conclude the work to be unsatisfactory, usually commissioning another artist to begin anew, and refusing payment to the first. These cases hinge around the request for changes. If the work, as later stated, was unusable, why then was the artist's time further consumed on changes that would be no more acceptable than the original work? Had the changes been caused by the artist's failure to maintain his own standards of performance? Obviously only men well acquainted with such matters could decide where the blame should fall.

In its early days the Committee, groping into a new field of business relationships, tended to favor the informal mediation, thus holding down the number of arbitrations. There is a growing tendency at the present time on the part of both the Committee and disputants to request arbitration, and an increased use of that method. There have been as many arbitrations since January 1955, as in the entire period 1948 to 1955. It must be remembered that many of the early years were spent in formulating the Code, and a few in getting the participating groups to accept it. There can be no question of the need for our work, the growing volume of which would certainly indicate a demand for it.

The amounts of money involved in these disagreements are usually small, but a case settled for $5,000 has been handled. The financial aspects are not our primary consideration, but rather the growing use of a uniform standard of conduct and operation in our profession. At all times the hope of a continuing business relationship between the respective parties is the uppermost thought of the Committee. To some degree, this has been the result.

In any event, through the Joint Ethics Committee, a profession which has long floundered in misunderstanding and confusion, and occasionally cupidity and exploitation, has found a method of putting its house in order, and offers to all who deal with that profession a board of appeal.

READINGS IN ARBITRATION

Recent Books and Pamphlets

Management Rights and the Arbitration Process. Edited by Jean T. McKelvey. In these proceedings of the ninth annual meeting of the National Academy of Arbitrators, many of the problems of the rights reserved to management in labor relations are discussed, from both the industrial and the labor viewpoint. Among the principal topics are: Arbitrability and the Arbitrator's Jurisdiction, by Jules J. Justin; Seniority and Ability, by Jay Kramer; Incentive Problems, by Pearce Davis; Classification Problems, by Morrison Handsaker; Concepts of Industrial Discipline, by Howard Myers; Policy and Practice of the American Arbitration Association, by J. Noble Braden; Federal Mediation and Conciliation Service, by Joseph F. Finnegan; Management's Reserved Rights—A Labor View, by Arthur J. Goldberg; and Reminiscences of the National Defense Mediation Board, by William H. Davis. The volume also contains the report by the Academy's Committee on Law and Legislation on the proposed Uniform Arbitration Act. Washington D.C.; Bureau of National Affairs, 1956, 237 pages. $3.50.

Compulsory Arbitration and Court Congestion. The Pennsylvania Compulsory Arbitration Statute. This study, in a series: Delay and Congestion—Suggested Remedies, deals with the operation, significance and effect of the Pennsylvania Statute (P.L. 2087 of 1952) in Common Pleas Courts of 67 counties in Pennsylvania. This pamphlet evaluates the Statute and discusses the number of appeals from arbitration awards, the evidence of speed-up in jury trials as a result of compulsory arbitration, and the costs of arbitration compared with the costs of jury trials. Court Rules, questionnaire forms and a chart of countrywide analysis give additional weight to this valuable study of practical operation of arbitration. New York Institute of Judicial Administration, N.Y.U., 1956, 65 pages.

Trends in Labor-Management Relations. The Proceedings of the Industrial Relations Institute of the University of Wisconsin cover views on many controversial issues in industrial relations. The topic on collective bargaining, mediation and arbitration includes addresses by Arthur M. Ross, from the public point of view, by Barnabas F. Sears, representing management, and by Thomas E. Harris, stating the labor viewpoint. Among the discussants were Joseph F. Finnegan, Robert H. Biron, J. Noble Braden and Merlyn S. Pitzele. Madison, Wis.: University of Wisconsin Extension Division, 1955, 175 pages.

Collective Bargaining in the Motion Picture Industry. By Hugh Lovell and Tasile Carter. This is the first issue of a series of short monographs on collective bargaining on the Pacific Coast. It analyses the industrial disputes of the motion picture industry and the struggle for stability and deals specifically with "Back-Lot" Crafts and the development of the Talent Guilds. Berkeley, Cal,: Institute of Industrial Relations, University of California, 1955, 54 pp. 50¢.

Private International Law. By G. C. Cheshire. This English standard work, in its fourth edition, deals with the Arbitration Act, 1950, which consolidates the Arbitration Acts, 1889 to 1934. In considering a submission for arbitration in a particular country, Professor Cheshire makes the following interesting remark: "Presumably, any forum in the world may be chosen though no case has been found in which it was other than English." The author discusses further problems of arbitration, as the "common feature of international commerce," especially ascertaining objectively the proper law of contract applicable to arbitration. New York: Oxford University Press, 1952, 687 p.

American Branch of International Law Association. Proceedings and Committee Reports 1955-1956. (119 p.) This booklet contains a report of the Committee on International Commercial Arbitration, which deals with the resolution of the Economic and Social Council of the United Nations, May 3, 1956, calling a conference in the Spring of 1958 to conclude a Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and to consider "other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes."

International Commercial Arbitration. This first volume of publications of the International Union of Lawyers is the outcome of discussions on commercial arbitration by the Union's Congresses, its Commissions and meetings of its Council. It is a practical guide to the arbitration law by seventeen leading authorities in European countries and the United States. The contributions follow a general outline, divided into specific chapters: the arbitration agreement, the arbitration proceedings, awards, means of recourse and enforcement of foreign awards. The introduction by the well-known Dutch lawyer, Pieter Sanders, who also contributed the chapter on Holland, is an excellent survey of the various isues which arise in the practice of commercial arbitration. References to leading court decisions in the various countries and to pertinent writings enhance the value of the handbook as a reliable source of current information. Among the contributors whose articles appear in both the English and French languages, are Sir Lynden Macassey (England), Jean Robert (France), D. J. Schottelius (Germany), Georges J. Economopoulos (Greece), Mario Braschi (Italy), Stellan Graaf (Sweden), Juan de Leyva y Andia (Spain), Max Guldener (Switzerland), Nacdet S. Yelmer (Turkey), and Martin Domke (United States). Paris, France: Dalloz and Sirey, 1956, 483 pages. $12.

Cases and Materials on International Law. By Lester B. Orfield and Edward D. Re. This new text book, ideal for use in courses and a valuable reference book for the lawyer with a foreign trade practice, deals with international procedure in respect to the development of state responsibilities and international claims. What the authors state on p. V of the preface applies equally to arbitration: "It must be remembered also that the cases reproduced in any casebook on the law represent an extremely small number of international contracts when compared with the tremendous volume of international transactions." Indiana: Bobbs Merrill Company, 1955. 781 p.

Articles and Notes in Legal Periodicals

Arbitration and the Lawyer's Place in the Business Community. By Sylvan Gotshal, 11 Business Lawyer (Section of Corporation, Banking and Business Law of the American Bar Association) 52-59 (1956).

Arbitration and Unanimity Agreements in the Close Corporation, 30 St. John's L. Rev. 262-269 (1956).

Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of award (*Griffith Co. v. San Diego College for Women,* 45 Cal. 2d 528, 289 P. 2d 476. 47 American Law Reports Annotated 2nd Series 1362-1367 (1956).

Commercial Arbitration and the Conflict of Laws, 56 Columbia L. Rev. 902-915 (1956).

Commercial Arbitration in Indiana and the Proposed Uniform Act, 31 Indiana L. J. 40 (1956).

Compulsory Arbitration: An Experiment in Pennsylvania. By Aaron S. Swartz, Jr., 42 Am. Bar Assn. J. 513-516 (1956).

Compulsory Arbitration to Relieve Trial Calendar Congestion, 8 Stanford L. Rev. 410-419 (1956).

Contract providing that it is governed by or subject to rules or regulations of a particular trade, business, or association as incorporating agreement to arbitrate. (*Riverdale Fabrics Corp. v. Tillinghast-Stiles Co.,* 306 N.Y. 288, 118 N.E. 2d 104, 41 A.L.R. 2d 867). 41 American Law Reports Annotated 2nd Series 872-878 (1956).

Corporations—Stockholders—Arbitration Allowed on Question of Removal of Majority Stockholder as Director of Close Corporation Despite Unanimity Agreement but not Allowed on Questions of Business Policy (*Matter of Burkin,* 286 App. Div. 740, 147 N.Y.S. 2d 2), 69 Harv. L. Rev. 1323-1325 (1956).

The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions. By James V. Joy, 25 Fordham L. Rev. 11-46 (1956).

Enforcement of Collective Bargaining Agreements in Missouri. By Richard W. Duesenberg, 24 Univ. of Kansas City L. Rev. 107-130 (1956).

Examination Before Trial in Arbitration Proceedings. By Benjamin Paul Goldman, 135 N.Y.L.J., April 18, 1956, p. 4, col. 1.

Insurance—Appraisal Agreements in Standard Fire Insurance Policy Not Subject to Arbitration (*Matter of Delmar Box Co.,* 309 N.Y. 60, 127 N.E. 2d 808), 25 Fordham L. Rev. 160-163 (1956).

Judicial Determination of the Arbitrable Issue in Labor Arbitration. By Ralph E. Kharas and Robert F. Koretz, 7 Syracuse L. Rev. 193-205 (1956).

Judgment Confirming Arbitration Award Vacated for Failure to Acquire Jurisdiction (*Republique Francaise v. Cellosilk Mfg. Co.,* 309 N.Y. 269), 56 Columbia L. Rev. 955-956 (1956).

Labor Law—Contract Provision Prohibiting Relocation of Plant—Equitable Considerations of Specific Performance (*Matter of Pocketbook Workers Union, AFL-CIO,* 149 N.Y.S. 2d 56), 31 N.Y.U. L. Rev. 959-963 (1956).

Labor-Management Arbitration. "There Ought to be a Law"—Or Ought There? By Robert L. Howard, 21 Missouri L. Rev. 1-44 (1956).

New Uniform Arbitration Act. By Maynard E. Pirsig, 11 Business Lawyer (Section of Corporation, Banking & Business Law of the American Bar Assn.) 44-51 (1956).

New Uses of Arbitration. By Sylvan Gotshal, 135 N.Y.L.J., No. 104, May 29, 1956, p. 4, and No. 105, May 31, 1956, p. 4.

A Partial Defense of the Uniform Arbitration Act. By William J. Isaacson, 7 Labor L. J. 329-334 (1956).

Some Questions About Labor Arbitration. By Pierre R. Loiseaux, 1956 Washington University L. Quar. 51-66 (1956).

Revocability of a Contract Stipulation for Arbitration Ruled a Matter of Substance Under the Erie Doctrine (*Bernhardt v. Polygraphic Co. of America,* 350 U. S. 198), 7 Syracuse L. Rev. 353-356 (1956).

Shaky Foundations of Arbitration. By Milton S. Marks, 13 Bar Bulletin, New York County Lawyers Assn. 206-209 (1956).

Validity and effect of arbitration agreement provision that, upon one party's failure to appoint arbitrator, controversy may be determined by arbitrator appointed by other party (*Kentucky River Mills v. Jackson,* 206 F. 2d 111). 47 American Law Reports Annotated 2nd Series 1346-1349 (1956).

Variation by the Arbitration Court of its Own Motion (*The Queen v. Kelly; Ex Parte Australian Railways Union*), 2 Sydney L. Rev. 172-175 (1956).

Voluntary Labor Arbitration is Threatened! By M. Herbert Syme, 7 Labor L. J. 142-145 (1956).

Wage Determination Under Compulsory Arbitration: The Basic Wage in Australia. By Leroy S. Merrifield, 24 George Washington L. Rev. 157-205 (1955); *Margins for Skill in Australia, ibid.,* 267-300 (1956).

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II, *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

COURT WILL NOT STAY ARBITRATION ON EMPLOYER'S CLAIM THAT CONTRACT WAS PROCURED "THROUGH DURESS AND COERCION" where employer failed to raise the claim "promptly and seasonably after the cessation of the alleged duress" and "continued to perform the agreement for several months and ratified the same by demanding from time to time that the union perform its obligation under the contract." The court held further that even though the collective bargaining agreement reserved the right to strike it was not void for lack of mutuality nor was the authorization of the arbitrator to impose fines or penalties a fact that would render it void and unenforceable. *Affiliated Coat & Apron Supply Co. v. Laundry Workers Joint Board of Greater N.Y., Amalgamated Clothing Workers of America,* N.Y.L.J., May 2, 1956, p. 7, Hecht, J.; aff'd 2 A.D. 2d 671 (June 19, 1956).

ARBITRATION WILL NOT BE STAYED DESPITE RESPONDENT'S ALLEGATION THAT CONTRACT WAS INDUCED BY FRAUD where arbitration clause covers "validity, interpretation and performance of the agreement," the court holding that such claim "does not avail petitioner in his contention that before arbitration the issue of fraud must first be eliminated, since it is respondent who seeks arbitration. Respondent as the aggrieved party could properly have proceeded to bring an action for rescission if he so chose, but not having done so he is entitled to proceed to arbitration." *Wrap-Vertizer Corp. v. Plotinick,* N.Y.L.J. May 1, 1956, p. 7, Hecht, J.

COURT ACTION AGAINST SWEDISH STEAMSHIP LINE TO RECOVER EXCESS CHARGES STAYED PENDING ARBITRATION inasmuch as the rate agreement was considered both a "maritime transaction" and "a contract evidencing a transaction involving commerce" within the meaning of the U. S. Arbitration Act. (See also *Arb. J.* 1955, p. 210). *Parsons & Whittemore, Inc. v. Rederiaktiebolaget Nordstjernan,* 141 F. Supp. 220, 1956 American Maritime Cases 1123 (Dist. Court, S.D. N.Y., March 22, 1956, Herlands, D. J.).

A LISTING OF ISSUES TO BE ARBITRATED DID NOT CONSTITUTE A VALID SUBMISSION AGREEMENT WITHIN THE MEANING OF SECTION 1449, N.Y. C.P.A., despite fact that this listing had been initialed by representatives of both parties. Court denied motion to stay suit since this writing contained "no words of agreement" and inasmuch as "a letter of the party's attorney makes it clear that the parties did not intend to leave their selection [of arbitrators] to the Supreme Court. . . . Before a court stamps a writing as a submission to arbitrate, it must insist upon a paper less uncertain and ambiguous than the one presently before us." *Writers Guild of America East v. Prockter Productions,* 1 N.Y. 2d 305 (Court of Appeals, May 31, 1956, Conway, Ch. J.).

ACTION FOR DAMAGES CAUSED BY BREACH OF NO-STRIKE CLAUSE STAYED UNDER FEDERAL ARBITRATION ACT, the court holding that an arbitration clause referring to "all disputes, grievances, or differences" was "broadly inclusive" enough to encompass a controversy over breach of the no-strike clause. Tracing the legislative history of the Federal Arbitration Act, the court said: "In view of the present, almost universal, approval of arbitration as a means for settling labor disputes, including the express approval of Congress [in Labor-Management Relations Act of 1947], we think the courts should interpret the United States Arbitration Act so as to further, rather than impede, arbitration in this area." *Signal-Stat Corp. v. Local 475, United Electrical, Radio and Machine Workers of America,* 26 LA 736 (U. S. Court of Appeals, Second Circuit, July 2, 1956, Frank, C. J.).

COURT ACTION TO RECOVER DAMAGES CAUSED EMPLOYER BY STRIKE WILL NOT BE STAYED PENDING ARBITRATION despite fact that contract did not contain a specific no-strike clause. In upholding the decision digested in *Arb. J.* 1955, p. 57 and 172, the court said :"Arbitration provisions in a collective bargaining agreement, of the sort here involved, should be read as implying a covenant on behalf of the union not to call a strike in derogation of the arbitration procedures." *Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 25, AFL v. W. L. Mead, Inc.,* 230 F. 2d 576 (U. S. Court of Appeals, First Circuit, March 6, 1956, Magruder, Ch. J.).

II. THE ARBITRABLE ISSUE

ARBITRATION CLAUSE LIMITED TO EXTRA WORK MAY NOT BE INVOKED FOR THE ARBITRATION OF DISPUTES NOT COVERED IN THE DESCRIPTION OF WORK CONTRACTED FOR. Said the court: "The intent of this clause was to leave the parties to the usual forms of plenary action when seeking enforcement of any claim arising under the items of work specifically contracted for but to provide for arbitration of any claim arising from alleged extra work involving items or subjects of work not embraced in the description of the work contracted for. A dispute regarding the amount of work done under the contracted items is accordingly not arbitrable." *Glickman Realty Const. Corp., N.Y.L.J.,* March 23, 1956, p. 7, Eder, J.

COURT WILL NOT STAY DISSOLUTION OF CLOSE CORPORATION PENDING ARBITRATION where arbitration clause covers matters other than dissolution and where stockholders' agreement is silent on matters of dissolution. *Application of Fulton-Washington Corp.*, 151 N.Y.S. 2d 417 (February 20, 1956, Christ, J.)

DISPUTE OVER EMPLOYER'S RIGHT TO SUBCONTRACT WORK IS NOT ARBITRABLE UNDER A CONTRACT PROVIDING ONLY FOR ARBITRATION OF DIFFERENCES "GROWING OUT OF MATTERS NOT SPECIFICALLY COVERED BY THIS AGREEMENT." While contract did not contain provision covering subcontracting, the court held the arbitration clause applied only to matters dealt with in the contract but not in full detail. *United Dairy Workers, L.I.U. No. 83, CIO v. Detroit Creamery Co.*, 26 LA 677 (Mich. Circuit Court, Wayne County, April 18, 1956, Murphy, J.).

DISPUTE OVER COLLECTIVE BARGAINING AGREEMENT IN NEW PLANT IN ANOTHER STATE IS ARBITRABLE despite employer's claim that such a contract cannot be negotiated without a showing of proof that the union represents a majority of employees in the new location. The employer had agreed in a collective bargaining contract at old establishment that he would bargain collectively with the same union and be subject to arbitration in case of dispute in the event he moved to another state. The court held that "where . . . there has been in effect a collective bargaining agreement, there is a presumption of legality which makes it unnecessary for the union to show, as a condition precedent to arbitration under such contract, that it had previously been established as the appropriate collective bargaining agent." A motion for stay of arbitration was therefore denied. *Red Seal Food Fashions v. Retail, Wholesale & Dept. Store Union, Dist. 65*, N.Y.L.J., March 26, 1956, p. 6, Eder, J., aff'd 153 N.Y.S. 2d 535.

DISPUTE OVER WHETHER REFUSAL TO TESTIFY BEFORE CONGRESSIONAL COMMITTEE CONSTITUTES "JUST CAUSE" FOR DISCHARGE IS ARBITRABLE DESPITE FACT THAT UNION'S ADDITIONAL CLAIM OF "REFUSAL TO BARGAIN" WOULD BE WITHIN EXCLUSIVE JURISDICTION OF NLRB. In holding that NLRB has no jurisdiction over whether discharges were proper under the contract, the court reversed the decision digested in *Arb. J.* 1955, p. 216, and thereby enforced the award which had directed reinstatement of the employees. *United Electrical, Radio and Machine Workers of America, Amalgamated Local 259 v. Worthington Corp. (Holyoke Works)*, 38 LRRM 2507 (U. S. Court of Appeals, First Circuit, July 31, 1956).

DISPUTE OVER ACCOUNTING AND DISPOSITION OF ASSETS OF PARTNERSHIP ARE ARBITRABLE under a partnership agreement arbitration clause referring to controversies "under or in connection with" the agreement, despite the fact that the partnership agreement was terminated by stipulation of the parties. Court action was therefore stayed. *Nathanson v. Nathanson*, N.Y.L.J., Aug. 21, 1956, p. 4, Rabin, J.

DISPUTE OVER RIGHT OF EMPLOYER TO CLOSE PLANT ONE DAY A WEEK IS ARBITRABLE under clause providing for arbitration of "all disputes, differences and grievances that may arise between the employer and the employees." The employer alleged that reduction of the work-week was made necessary by lower volume of business, but the court held that it was for the arbitrator to determine whether such reduction was a violation of the lockout and layoff provisions of the contract. The union's motion to direct arbitration was granted. *Fay v. Phenix Soda Fountain Co.,* 153 N.Y.S. 2d 153.

DISPUTE OVER DESIGNATION OF NEW JOB CLASSIFICATION IS ARBITRABLE under a clause covering "application of the contract" where one provision of the contract requires the employer to "furnish to the Guild in writing within a week after their employment or transfer the names, addresses, telephone numbers, date of hiring or transfer, contract classifications and job experience rating of persons hired or transferred into the Guild's jurisdiction after the effective date of this contract." In directing arbitration, the court stated that "future employees as well as the persons employed on the date of the agreement . . . were subject to its terms." *N.Y. Journal-American v. Potoker,* N.Y.L.J., May 23, 1956, p. 7, Gavagan, J.

CLAIM FOR RECOVERY OF POSSESSION IS ARBITRABLE UNDER BROAD CLAUSE COVERING "ANY MATTER WHATEVER," the court saying: "There is no statutory or other prohibition against the arbitration of a replevin claim." *Starilian Lapidaries, Inc. v. Light,* N.Y.L.J., June 25, 1956, p. 6, Levey, J.

DISPUTE OVER WHETHER SKILLS INVOLVED IN INSTALLING ATTACHMENTS TO TYPEWRITERS ARE OF SUCH HIGH ORDER AS TO PLACE REPAIRMEN OUTSIDE THE BARGAINING UNIT IS ARBITRABLE. Decision digested in *Arb. J.* 1956, p. 53, was reversed and a stay of arbitration was denied. *Royal McBee Corp. v. Gough* (*Local 459, Business Machine & Office Appliance Mechanics Conference Board, IUE, AFL-CIO*), 1 App. Div. 2d 647, 152 N.Y.S. 2d 887 (First Dept., June 26, 1956).

WHETHER DISPUTE OVER DISCHARGE OF EMPLOYEES IS ARBITRABLE IS FOR THE ARBITRATOR TO DETERMINE. Allegation that employer's conduct constituted an unfair labor practice within jurisdiction of NLRB does not preclude arbitration to dispose of other issues not within jurisdiction of NLRB under a contract providing for arbitration of "grievances or disputes arising from the application of this agreement." The court therefore refused to enjoin arbitration of that issue. *Post Publishing Co. v. Cort,* 1956 Advance Sheets 641 (Mass. Supreme Judicial Court, May 29, 1956).

DISPUTE OVER WAGES IS ARBITRABLE DESPITE EXPIRATION OF CONTRACT where issue dated from mid-term reopening period. *Milner Hotels v. Hotel Front Service Employees' Union, Local 144,* N.Y.L.J., July 13, 1956, p. 3, Jacob Markowitz, J.

DISPUTE OVER DAMAGE CAUSED TO RAILROAD COMPANY BY WANTON CONDUCT OF EMPLOYEES IS NOT ARBITRABLE under inter-railroad detour agreement which exempts and indemnifies home company against loss or damage from the detouring. Damage had come about as a result of collision caused by carelessness of employees of home company. Since the agreement as a whole was deemed not applicable to such a situation, neither was the arbitration clause. *The Alabama Great So. R. Co. v. Louisville & Nashville R. Co.*, 127 F. Supp. 363 (N. D. Ala. Jan. 3, 1955, Lynne, Ch. J.).

DISPUTE OVER RIGHT OF EMPLOYER TO DISCONTINUE A PLANT AND TRANSFER WORK TO A WHOLLY-OWNED SUBSIDIARY IN ANOTHER STATE IS ARBITRABLE inasmuch as it involves questions of whether employees were discharged for "just cause," or locked out, or whether goods are being manufactured by others for this employer, all of which questions are arbitrable under the contract. The Appellate Division unanimously reversed the decision digested in *Arb. J.* 1955, p. 208. *Acme Backing Corp. v. District 65, Distributive, Processing and Office Workers of America*, 2 App. Div. 2d 61, 152 N.Y.S. 2d 889 (First Dept. June 26, 1956).

WHETHER UNION'S STRIKE TO PREVENT EMPLOYER FROM SUBCONTRACTING WORK WAS A BREACH OF CONTRACT IS NOT AN ARBITRABLE ISSUE and court will not stay employer's action under Sec. 301 of Taft-Hartley Act. The union sought, by invoking Sec. 3 of the Federal Arbitration Act, to stay the action, but the court held: "Even if the unions originally had an issue referable to arbitration, they chose instead to resolve that issue in their favor by use of their economic strength." *Cuneo Press v. Kokomo Paper Handlers' Union No. 34, AFL*, 26 LA 679 (U. S. Court of Appeals, Seventh Circuit, July 2, 1956, Schnackenberg, C. J.).

DISPUTE OVER WHETHER SERVICEMEN ON NEWLY CREATED DEVICE CAME WITHIN CONTRACT CLASSIFICATION "SERVICE DEPARTMENT EMPLOYEES", OR WHETHER A NEW JOB CLASSIFICATION WAS REQUIRED, IS ARBITRABLE despite contractual provision excluding from arbitration "questions involving changes in the terms . . . of this agreement." *Royal Typewriter Co. v. Mechanical & Electrical Workers Union of America, Local No. 1 (Independent)*, 2 Misc. 2d 159, aff'd without opinion 277 App. Div. 982.

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

INDIVIDUAL EMPLOYEE, BEING THIRD PARTY BENEFICIARY RATHER THAN DIRECT PARTY TO COLLECTIVE BARGAINING AGREEMENT, MAY NOT COMPEL UNION OR EMPLOYER TO ARBITRATE HIS GRIEVANCE. *Curet v. Landriscina*, N.Y.L.J., May 22, 1956, Nathan, J.; *Doyle v. LaSorda*, N.Y.L.J., May 28, 1956, p. 7, Aurelio, J.; *Trimarchi v. Sheffield Farms*, N.Y.L.J., July 16, 1956, p. 3, Arthur Markewich, J.

ACTION FOR BREACH OF CONTRACT STAYED IN FEDERAL COURT WHERE DISPUTE WAS REFERABLE TO ARBITRATION BUT COURT WOULD NOT DIRECT ARBITRATION IN ABSENCE OF INTERSTATE OR MARITIME ISSUE. Holding that the law of New York, i.e., art. 84 of the N.Y. Civil Practice Act, controls, and referring to *Bernhardt v. Polygraphic Co.* 350 U.S. 198, the court said: "Power to direct the submission of a dispute to arbitrators is, under New York law, reserved to the Supreme Court of that State or a judge thereof." *Amalgamated Growth Industries v. Borcoa, Inc.,* 139 F. Supp. 17 (S.D. N.Y., March 9, 1956, Sugarman, D.J.).

ACTION TO DISSOLVE CLOSE CORPORATION DOES NOT CONSTITUTE WAIVER OF RIGHT TO ARBITRATE A MATTER TO WHICH CORPORATION WAS A PARTY. In referring to *Wolsky v. Duchovny,* 151 N.Y.S. 2d 94 and 239 (the latter digested in *Arb. J.* 1956, p. 54), the court denied stay of arbitration and granted a cross-motion to compel arbitration. *Katz v. Burkin,* 151 N.Y.S. 2d 240 (Jan. 23, 1956, McGivern, J.).

FILING OF COUNTERCLAIM DEPRIVES PARTY OF RIGHT TO ARBITRATION, ALL THE MORE SO AS SIX MONTHS ELAPSED AFTER COMMENCEMENT OF ACTION. In denying the defendant a stay of action, the court said: "The zealous enforcement of the arbitration clause in contracts has been to encourage speedy determination of controversies. Through arbitration, the delay and expense of court proceedings are avoided. It was never the intention of the legislature or the courts to utilize Article 84 of the Civil Practice Act to delay justice. . . . The defendants have waived their right to arbitration and besides, their laches in demanding such remedy should preclude them at this time." *Crompton-Richmond Co. v. William Nelligan, Inc.,* 151 N.Y.S. 2d 154 (City Court, N.Y., April 19, 1956, Baer, J.).

ARBITRATION DIRECTED UNDER SECTION 301, TAFT-HARTLEY ACT, OF DISPUTE OVER FRINGE BENEFITS DESPITE TERMINATION OF ALL OPERATIONS. Upholding the decision digested in *Arb. J.* 1955, p. 167, the court said: "We believe that there may be terms within a union-employer contract whose effect is not necessarily limited to the continuance of the living relationship that exists while the business is being operated as a going concern." *Goodall-Sanford, Inc. v. United Textile Workers of America, AFL, Local 1802,* 233 F. 2d 104 (First Circuit, April 25, 1956, Magruder, Ch. J.).

INITIATION OF COURT ACTION FOR DISMISSAL PAY CONSTITUTED WAIVER OF UNION'S RIGHT TO ARBITRATE, particularly where union rejected urgent pleas by other unions to join in prosecution of claim through grievance procedure and arbitration. *Int'l Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the U. S. and Canada, Local 659 v. Color Corp. of America,* 26 LA 703 (Calif. Dist. Court of Appeal, Second Dist., June 18, 1956, Ashburn, J.).

FEDERAL COURT DENIES MOTION TO DIRECT ARBITRATION OF DISPUTE OVER VACATION PAY, the court holding that, inasmuch as it had no authority to entertain the union's action for wages, it had no authority to direct arbitration. *Textile Workers Union of America, CIO v. Williamsport Textile Corp.*, 136 F. Supp. 407 (D. C., Middle Dist. Pa., Nov. 30, 1955, Murphy, Ch. J.).

COURT ACTION AGAINST EMPLOYER AND UNION FOR DAMAGES DUE TO WRONGFUL DISCHARGE BARRED EVEN THOUGH UNION AND COMPANY REFUSED TO TAKE GRIEVANCE TO ARBITRATION, since the collective bargaining agreement does not require initiation of such arbitration. Said the court: "The union, as heretofore pointed out, as the representative of appellant, exercised its discretion in this case and elected not to proceed to arbitration under the step four procedure. It therefore failed to exhaust the grievance procedure which is, by the contract, the exclusive method for adjusting claims or disputes of an employee against the company." *Terrell v. Local Lodge 758, Int'l Ass'n of Machinists*, 26 LA 579 (Calif. Dist. Court of Appeal, Second Dist., April 23, 1956, Fourt, J.).

DETERMINATION OF LOS ANGELES AS LOCALE OF ARBITRATION IN ACCORDANCE WITH AAA COMMERCIAL ARBITRATION RULES valid where arbitration clause referred to AAA Rules. A distribution contract between a Boston and a Los Angeles corporation provided for the application of "the law of the Commonwealth of Massachusetts," and for settlement of disputes by arbitration under AAA Rules "at the place where the dispute arises." Inasmuch as the parties did not agree on such place, the Association, pursuant to its Rule 10, designated Los Angeles, after both parties presented their written arguments on the question of locale. An action to enjoin the Association from proceeding with the arbitration in Los Angeles was dismissed by the Massachusetts court, which considered the agreement valid, stating that "the plaintiff is not deprived of any of its rights under it, but . . . the plaintiff's remedies, if any, may only be asserted when the arbitration has been concluded." *Special Devices, Inc. v. American Arbitration Association*, Superior Court, Suffolk County, Mass., No. 69824, July 10, 1956, Beaudreau, J.

COURT DIRECTS ARBITRATION DEMANDED BY MULTI-EMPLOYER LOCAL UNION DESPITE FACT THAT EMPLOYEES OF NEWSPAPER VOTED NOT TO RECOMMEND ARBITRATION OF DISCHARGE OF COPY-READER inasmuch as collective bargaining agreement was signed by the union "for itself and on behalf of all the employees." Reversing a decision digested in *Arb.* J. 1955, p. 211, the Appellate Division stated: "Once an agent has been designated for collective bargaining purposes, the membership it represents cannot assume to reject certain acts of its bargaining representatives and accept others. To hold otherwise would make a shambles of all labor negotiations and would be a refutation of long experience in that field." *New York Times Co. v. Newspaper Guild of New York, Local 3, CIO*, 2 App. Div. 2d 31, 152 N.Y.S. 2d 884 (First Dept., June 26, 1956, Valente, J.).

ARBITRATION WILL NOT BE DIRECTED WHERE PARTY FAILED TO DEMAND ARBITRATION WITHIN TIME LIMIT SET FORTH IN THE CONTRACT when failure to make timely demand was not attributable to the other party. Under the collective bargaining agreement, failure to agree upon terms of a new contract could result in arbitration if demanded prior to August 1, 1954. The union did not demand arbitration until March 29, 1955. *First National City Bank of N.Y. v. Troy,* N.Y.L.J., April 4, 1956, p. 7, Eder, J.

EX-EMPLOYEES MAY NOT DEMAND ARBITRATION AS INDIVIDUALS WHERE THE UNION HAS REFUSED TO DO SO ON THEIR BEHALF. Said the court, in refusing the application to direct arbitration: "To direct arbitration upon request of individual employees, when their union has refused to demand arbitration, would create an unstable and chaotic condition not conducive to industrial harmony, as well as violative of the clear statement in the collective bargaining agreement of the parties who may demand arbitration (*Bianculli v. Brooklyn Union Gas Co.,* 115 N.Y.S. 2d 715; *Sholgen v. Lipsett, Inc.,* 116 N.Y.S. 2d 165)." *Cox v. R. H. Macy & Co.,* 152 N.Y.S. 2d 858 (Eder, J.).

A DEPARTMENT OF A STATE GOVERNMENT MAY AGREE TO ARBITRATE and enforcement of such agreement may not be denied on the ground that it violates a state's constitutional immunity from suits. The Kentucky Department of Highways had entered into an agreement, including an arbitration provision, for engineering services in construction of a toll road. A dispute over additional compensation led to arbitration hearings, in the course of which the Commissioner of Highways cancelled the arbitration agreement. The engineering firm sought enforcement of the arbitration agreement through court action, to which the State pleaded constitutional immunity as a defense. The Court of Appeals held that the State agency was expressly authorized to enter into the contract involved and "by necessary implication authorized to sue or be sued thereon." The authority of the Department to enter into the arbitration agreement could not be challenged since, said the court, "this is clearly a supplemental contract it was authorized to make. To the extent that the arbitration agreement relates to the enforcement or performance of the contract . . . the attempted cancellation of the agreement was ineffective to terminate that proceeding." *Watkins v. Dept. of Highways of the Commonwealth of Kentucky,* 290 S.W. 2d 28 (Court of Appeals of Ky., May 5, 1956, Clay, Commissioner).

COURT DENIES EMPLOYEE'S MOTION TO DIRECT A UNION TO INITIATE ARBITRATION IN HIS BEHALF inasmuch as "the law with respect to the rights of a union member to compel arbitration is in a state of flux." The court concluded: "There may be one or more forms of remedy available to a member to assure his protection and the appropriate redress of his rights, but not by motion to compel arbitration." *Doyle v. La Sorda,* N.Y.L.J., May 3, 1956, p. 7, Aurelio, J.

COURT WILL NOT ENFORCE AGREEMENT TO ARBITRATE LABOR DISPUTE UNDER FEDERAL ARBITRATION ACT since this statute does not confer jurisdiction on courts to enforce "quasi-legislative" as against "quasi-judicial" awards. An expiring collective bargaining agreement provided that disputes over terms of the next contract which could not be resolved in conciliation were to be settled in arbitration. A motion to compel such arbitration was dismissed, the court holding: "No one would be happy to have judges again exercising quasi-legislative magistracy over labor problems of uncertain dimension. . . . [The] United States arbitration statute . . . is concerned only with the enforcement of quasi-judicial awards directed at the ascertainment of facts in a past controversy and at the prescription of recoverable damages or other suitable awards for that which has been broken not for that which is to be built." *Boston Printing Pressmen's Union v. Potter Press,* 141 F. Supp. 553 (D. C. Mass., May 29, 1956, Wyzanski, D. J.).

IV. THE ARBITRATOR

EXCHANGE OF PERSONAL WARTIME REMINISCENCES BETWEEN ARBITRATOR AND ATTORNEY FOR ONE PARTY DID NOT CONSTITUTE PARTIALITY. The Appellate Division denied a motion to disqualify the arbitrator, saying: "We agree with Special Term that an indiscretion on the part of appellant's counsel led to injudicious conduct on the part of the arbitrator. We find no showing, however, of partiality on the part of the arbitrator. The conclusion is inescapable on this record that the application to remove the arbitrator was not dictated by any conviction on the part of respondents that the arbitrator was partial, but rather by their concern over developments in the case. It is unfortunate that the proceeding has taken the course it has taken, but we still assume that all the arbitrators can discharge their duties with scrupulous fairness and impartiality." *De Nicola v. Polcini,* 2 A. D. 2d 675, 152 N.Y.S. 2d 995 (First Dept., June 26, 1956).

COURT DIRECTS ARBITRATOR TO DISREGARD CERTAIN FACTORS IN COMPUTING AMOUNT OF RENT TO BE PAID. A lease of property provided for rent during renewal period to consist of 6% of the "full and fair value of the land . . . free of lease and unencumbered." A dispute arose as to whether certain restrictions in the contract, such as forbidding changes, etc., could be taken into account by the arbitrators as a factor in the value of the land. In an action for declaratory judgment prior to arbitration, the court held that "the land is to be valued in accordance with the formula of the underlying lease, without treating as an element of value the restrictions on user flowing from the lease." *Ruth v. S.Z.B. Corp.,* 153 N.Y.S. 2d 163 (Hofstadter, J.).

ARBITRATORS ACTED WITHIN THEIR AUTHORITY IN CONSIDERING PAST PRACTICE IN DISPUTE OVER MANNER OF DELIVERY OF COMIC SECTION OF NEWSPAPER, where collective bargaining agreement gave employer the right to continue such practice in spite of technical violation of other provisions of contract. *Feldman v. Daily Mirror,* N.Y.L.J., July 11, 1956, p. 2, Lupiano, J.

ARBITRATORS MAY DETERMINE TIMELINESS OF CLAIM despite fact that contract places limit of 90 days for claim for damages or breach of warranty, inasmuch as such restriction does not constitute statute of limitation for initiating arbitration. Said the court: "It is for the arbitrators to determine whether they shall allow the claim or reject it as untimely made. This court cannot say as a matter of law that the time limitation is so reasonable as to preclude the presentation of claims for latent defects." *Burn & Bloomgarden v. Sherman,* N.Y.L.J., June 25, 1956, p. 6, Levey, J.

V. THE PROCEEDINGS

PARTICIPATION IN ARBITRATION CONSTITUTES WAIVER OF RIGHT TO CHALLENGE ARBITRATOR AFTER AWARD, all the more so when challenge made prior to hearing was withdrawn by attorney who then consented to proceed on the merits. Said the court: "There is no sound reason to suggest that respondent may, after losing the arbitration, object to the award when he not only knew all the facts upon which his objection to an arbitrator is based but actually challenged him before the proceeding." *Frank Ix & Sons v. Granville,* 152 N.Y.S. 2d 242 (March 21, 1956, Eder, J.).

PRESIDENT OF CLOSE CORPORATION MAY NOT INSTITUTE ARBITRATION AGAINST ANOTHER FIRM WITHOUT APPROVAL OF BOARD OF DIRECTORS WHEN HE KNEW SUCH PROCEEDINGS WOULD BE AGAINST THE WISHES OF 50 PERCENT OF THE DIRECTORATE. In a close Pennsylvania corporation, stock was equally divided between the president and the secretary. These two, plus two others named by them, constituted the directorate. When a dispute arose between the president and a manufacturing company controlled by the secretary, the president sought to institute arbitration without having the approval of a majority of the directors. In staying arbitration, the Appellate Division said: "If the president of a corporation is considered to have carte blanche, the right to institute actions in the name of the corporation without approval of the board of directors, the result would be to destroy to a large extent the protection which is sought by parties who engage in a corporate enterprise under an agreement that the stock and directorate control will be equally divided." *Paloma Frocks v. Shamokin Sportswear,* 1 App. Div. 2d 640, 152 N.Y.S. 2d 652 (First Dept., June 19, 1956, Rabin, J.).

CHALLENGE TO AWARD MUST BE MADE WITHIN THREE MONTHS UNDER N. Y. ARBITRATION STATUTE. A landlord and tenant executed a lease on the basis of an arbitral award which had not been confirmed in court. The tenant later sought, through court action, to recover rent paid in excess of the emergency rent. The courts held that pursuant to Sec. 1463 C.P.A. an application to vacate an award must be made within three months. Since the tenant had not done so, the plenary action was barred and the complaint was dismissed. *Heller Candy Co. v. 385 Gerard Avenue Realty Corp.,* 309 N.Y. 937, 132 N.E. 2d 312 (Court of Appeals, Dec. 28, 1955).

ARBITRATOR MAY DETERMINE WHETHER RECORDS REQUESTED BY ONE PARTY OF ANOTHER WOULD BE RELEVANT TO THE DISPUTE and court will not vacate an award for refusal of arbitrator to direct a party to produce those records even if arbitrator erred in judgment on this matter. Only misconduct would result in vacation of award. Said the court: "The request for record production appears to be a matter within the discretion of the arbitrators in the same sense in which a trial justice is empowered to decide what records a party should be compelled to produce. This is not a refusal to hear pertinent evidence which a party offers for consideration to arbitrators, but simply a refusal to compel the adverse party to produce certain records which are not shown to be clearly relevant to the disputed issue. . . . Any other rule would straitjacket the beneficient purposes intended to be accomplished by arbitration in the adjustment of commercial disputes. Here, moreover, under the agreement the arbitration was to be held in accordance with the rules of the American Arbitration Association, which expressly provide that the arbitrator may grant any relief he deems just and within the scope of the agreement." *A. D. Juilliard & Co. v. Baitch & Castaldi,* 152 N.Y.S. 2d 394 (Eder, J.).

QUESTION OF WHETHER SUBCONTRACTOR COMPLETED WORK IS FOR ARBITRATOR TO DECIDE. A contractor resisted arbitration and refused to name his arbitrator, relying upon a clause which said that subcontractor could not demand arbitration until after completion of his work. The subcontractor thereupon asked the court to appoint the contractor's arbitrator. The court, in granting the motion, said that the question of "substantial performance by the petitioner is properly for the arbitrators to decide. Respondent may not unilaterally determine that petitioner has failed to perform its portion of the contract," referring to *Matter of Lipman,* 289 N.Y. 76, and *Application of Met. Life Ins. Co.,* 86 N.Y.S. 2d 718. *B. & A. Carpenters v. Harry Jereski, Inc.,* N.Y.L.J., March 22, 1956, p. 6, Greenberg, J.; aff'd 2 A.D. 2d 671, 153 N.Y.S. 2d 556.

ARCHITECT MAY DEMAND ARBITRATION PURSUANT TO AAA CLAUSE WITHOUT SEEKING COURT ORDER DIRECTING ARBITRATION inasmuch as Chapter 2711 of the Revised Code of Ohio, like Section 1450 (1) of N. Y. C.P.A., makes court action to compel arbitration permissive, not mandatory. In denying a motion to enjoin the architect from proceeding with arbitration, the court said: "In the Court's opinion Revised Code Section 2711.03 is permissive, providing a statutory method of enforcing an arbitration agreement for such as wish to use it. It is not, however, exclusive and a party may not be held to have forfeited all his rights under an agreement to arbitrate by failing to proceed under the statute. In the Court's opinion he may proceed under the agreement to arbitrate as though there were no such statutory provisions, foregoing any advantages which might have been enjoyed under the statute." *Incorporated Trustees of the Gospel Workers Society v. Gattozzi,* Court of Common Pleas, Cuyahoga County, Ohio, No. 676006, March 16, 1956 and April 10, 1956, Hanna, J.

VI. THE AWARD

ARBITRATOR IS FINAL JUDGE OF MERITS OF DISPUTE. An action to recover $24.50 before Small Claims Court in New York was submitted to arbitrator on written stipulation of the parties. An award in favor of plaintiff was challenged as being contrary to weight of evidence. After appearance of State Attorney General as amicus curiae for the President Justice of the Municipal Court, the Appellate Term, First Dept. denied motion to vacate the award inasmuch as arbitration had been agreed to and parties were bound by award. Said the court: "To hold otherwise would completely weaken the whole structure and main purpose of the Small Claims Court by undermining the stability and finality of its judgments." *Trager v. Abalene Blouse & Sportswear Corp.*, 1 Misc. 2d 952 (App. Term, First Dept., January 12, 1956, Hofstadter, J.).

AWARD DIRECTING REINSTATEMENT OF EMPLOYEE WITH BACK PAY UPHELD AS PROPER INTERPRETATION OF EMPLOYEE'S CONTRACTUAL RIGHTS despite fact that arbitrator reached his decision on basis of interpretation of a memorandum. Employer's claim that in considering the memorandum the arbitrator exceeded his authority, which was limited to interpretation of contract, was rejected, since interpretation given memorandum was one which did not conflict with contract. *New Britain Machine Co. v. Lodge 1021, Int'l Ass'n of Machinists,* 26 LA 461 (Conn. Supreme Court of Errors, May 22, 1956, Baldwin, J.).

AWARD DIRECTING REINSTATEMENT OF DISCHARGED EMPLOYEE VACATED in absence of collective bargaining agreement provision for submission of disputes to arbitration. The employer had denied arbitrability of a discharge but was directed by a lower court to proceed to arbitration. The award directed reinstatement of the employee, although the arbitrator stated in his written opinion that if the issue of arbitrability had been put before him, he would have found the grievance not arbitrable in view of the failure of the parties to provide for arbitration of discharges in their contract. *O'Malley (Local 128, Oil Workers Int'l Union, CIO) v. Petroleum Maintenance Co.*, 143 A.C.A. 323 (Calif. Dist. Court of Appeal, Second Dist., July 20, 1956, Moore, P. J.).

AWARD CONFIRMED UPHOLDING UNION RULES BARRING TRANSFER OF WORK BY EMPLOYER FROM ONE PLANT TO ANOTHER AS NOT VIOLATING STATE ANTITRUST LAWS AND NOT CONTRARY TO PUBLIC POLICY inasmuch as these rules "affect hours, wages, working conditions, seniority, and job security and kindred labor concerns." Said the court in confirming the award: "Nothing is more clearly established than the proposition that the arrangements made by a bona fide labor union in a bona fide effort in the regulation of matters affecting the general interest and welfare of labor are unassailable. In addition, there is no claim here of fraud, corruption or other misconduct and in the absence thereof the award is likewise unassailable." *Simon v. Sun-Ar Wet Wash Laundry,* N.Y.L.J., April 17, 1956, p. 7, Aurelio, J.

ARBITRATOR'S DETERMINATION OF LAW AND FACTS IS "FINAL AND CONCLUSIVE, and a court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established, or there is some provision in the agreement of submission authorizing it (*Matter of Wilkins*, 169 N.Y. 494, 496)." An arbitrator denied a discharged employee severance and vacation pay, although he specifically held the employee not guilty of acts of moral turpitude, or of a "voluntary quit" which, under the contract, would have justified denial of these benefits. In confirming the award, the court said: "Parties to agreements of arbitration consent to the more or less informal practices and forms which are customary in such proceedings and cannot, when they have been unsuccessful, be heard to complain that the strictures and formalities of legal proceedings have not been followed. The issues submitted to the arbitrator were broad enough to include all questions concerning wages, discharges and 'voluntary quits.'" *Fay v. Burndy Eng. Co.*, N.Y.L.J., March 29, 1956, p. 8, McDonald, J.

AWARD CANNOT BE VACATED ON GROUND OF FRAUD AFTER EIGHT YEARS. A sub-tenant entered into an arbitration agreement with a tenant to determine the emergency rent for commercial premises. After paying the rent awarded by an arbitrator for 8 years, the sub-tenant sought vacation of the award on ground of fraud. Said the court: "If fraud there was, the tenant was a party to it, and has for eight years acquiesced in it, and has by its own neglect induced other parties, including the plaintiff, to assume obligations in reliance upon the validity of the emergency rent as determined by the arbitration award. It is, therefore, stopped from changing its position now." *Jabe Estates, Inc. v. Real Curtains, Inc.*, 149 N.Y.S. 2d 452 (December 14, 1955, Wachtel, J.).

INTEREST ON AN AWARD RUNS FROM DATE OF AWARD, UNLESS ARBITRATOR DIRECTED OTHERWISE. In moving for confirmation of an award, petitioner, asked for interest from the date the sum awarded was found to be due. The court confirmed the award as made, but rejected "attachment of certain conditions for the payment of the award." The court concluded: "In the absence of any valid objection to the award, it must be confirmed as made." *Heating Maintenance Corp. of N.Y. v. 720 Fifth Avenue Realty Co.*, N.Y.L.J., May 3, 1956, and May 15, 1956, p. 6, Aurelio, J.

COURT WILL NOT VACATE AWARD UPHOLDING DISCHARGE ON MOTION OF AGGRIEVED EMPLOYEE who named the union, his former employer and the arbitrator as defendants. Said the court: "The arbitrator is not a proper party and no sufficient ground is furnished for individual action even if permissible rather than motion by the union as the contracting party with the employer. Indeed, the award has heretofore been confirmed and its vacatur on the motion of the employer denied.' *Carhart v. ABC Motor Transp. Co., Inc.*, N.Y.L.J., May 9, 1956, p. 6, Aurelio, J.

CONFIRMATION OF AWARD DEFERRED AND MATTER REMITTED TO ARBITRATORS WHERE NEW DISPUTE AROSE FOLLOWING THE AWARD, which dispute was arbitrable under the contract, and "inextricably connected with the controversy involved herein," though not before the arbitrators in the original proceedings. The contract had provided for partial payment in advance of delivery of goods, with payment of balance 10 days after delivery. An award directing partial payment of $2056.20 in advance of delivery was confirmed by the court. Later, when buyer protested the quality of merchandise delivered, the same court reconsidered the earlier confirmation and remitted the whole matter back to the arbitrators. Said the court: "In these circumstances, confirmation of the award should await the determination of the arbitrators of the question now presented, whether the goods delivered conform with the terms of the contract." *Textile Sales Corp. v. Judy Lane, Inc.*, N.Y.L.J., June 4, 1956, p. 8, Aurelio, J.

ARBITRATOR'S AWARD MAY GRANT INJUNCTIVE RELIEF. The buyer of a wholesale dry cleaning route accused the seller of breaching an agreement not to compete in the same area. The arbitrator awarded monetary damages to the buyer and restrained the seller from reentering the wholesale dry cleaning business in the area for the remainder of the five-year period originally agreed upon. The seller sought to upset the award on the grounds that injunctive relief exceeded the arbitrator's authority. The court rejected this contention, saying: "No instance when the arbitrator exceeded his powers or imperfectly executed them is apparent to this court. Respondent joined in conferring upon the arbitrator the power to hear disputes and agreed that his decision would be binding. Respondent does not deny that it has violated its contract by engaging in the wholesale dry cleaning business and accepting work from retailers who were on the route sold to petitioner. Therefore the arbitrator had powers to restrain and to award damages. Whether there was or was not a legal basis for the award of damages, the court cannot determine from the papers before it, but in either event the court would not disturb the award. Absent of fraud, corruption or other misconduct, the arbitrator's award is unassailable. His determination, either as to law or fact, is final and conclusive. Otherwise the award would become the commencement instead of the end of litigation." *Montclair Cleaners v. Riverside Cleaners*, N.Y.L.J., July 11, 1956, p. 7, Gallagher, J.

GRANTING OR DENYING ADJOURNMENT IS WITHIN ARBITRATOR'S AUTHORITY. Award upheld despite fact that arbitrator refused to grant a party's request for adjournment on the ground that his attorney "could not be present," where party continued to participate in proceedings. Said the court: "Respondent was not deprived of its right to counsel. It was respondent's responsibility to avail itself of that right and have counsel present. There is no showing that there existed sufficient excuse for counsel's absence, and without such showing the court will not hold there was an abuse of discretion in refusing an adjournment, particularly since respondent's refusal to accept the notice sent by registered mail indicated a desire to delay and obstruct (*Stafford Internat. Corp. v. Hartman*, 89 N.Y.S. 172)." *Montclair Cleaners v. Riverside Cleaners*, N.Y.L.J., July 11, 1956, p. 7, Gallagher, J.

AN EDITORIAL

(*Continued from Page* 113)

the Commissioners on Uniform State Laws in advance of this year's meeting, which took place the week of August 20 in Dallas. All the correspondence was reviewed and considerable time was spent in discussion. As a result, Section twelve was rewritten, reducing from seven to five the number of circumstances which permit vacation of awards. The amended part of Section twelve, with the deleted phrases shown in italics, now reads as follows:

"Section 12—Vacating an Award. (a) Upon application of a party, the court shall vacate an award where: (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers *or rendered an award contrary to public policy;* (*4*) *The award is so indefinite or incomplete that it cannot be performed;* (5) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to provisions of Section 5, as to prejudice substantially the rights of a party; (*6*) *The award is so grossly erroneous as to imply bad faith on the part of the arbitrators;* or (7) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; . . ."

In evaluating the effect of these changes, the basic premises of modern arbitration laws should be kept in mind. Briefly, it may be stated that while arbitration is based upon goodwill, such goodwill is not in itself sufficient to give users of arbitration clauses all the security they need against frustration of arbitration by a reluctant party. In modern economic life, parties to contracts must be able to enforce future dispute clauses through the courts, if necessary. By the same token, they must be able to stay court action initiated in violation of an arbitration clause. The voluntary nature of arbitration must be preserved. This implies that courts will provide such remedies as appointment of arbitrators, where parties fail to do so (in accordance with procedures the parties themselves outline in their contract)

but that courts will not otherwise interfere in the process, except to determine whether there was misconduct on the part of the arbitrator, if an award is challenged on that basis. Above all, a modern arbitration statute must make it clear that the arbitrator chosen by mutual agreement of the parties is the final judge on matters of fact and law properly before him.

All of these requirements of a good law were in the Uniform Arbitration Act adopted last year and are continued in the revision with the addition of improvements in Section twelve. In summarizing the law last year, we listed ten chief features. These ten points are still characteristic of the Uniform Act in its amended form. We can therefore do no better in concluding this editorial than we did last year, when we said:

"The basic provisions of the Act include:

"1. Future dispute clauses are made specifically enforceable in labor-management as well as commercial contracts.

"2. When a question is raised as to the existence of an agreement to arbitrate, the court is required summarily to determine that question and, where an agreement exists, direct arbitration even if the issue in dispute 'lacks merit or bona fides.'

"3. No appeal is permitted from an order directing arbitration, but the question of validity and application of a contract may be raised after the award is made.

"4. Parties are permitted to agree upon any procedure for the selection of arbitrators, conduct of hearings and apportionment of expenses, but where they fail to agree, or where any lapse or default occurs, the court, on application, will remedy such default or lapse.

"5. If during the course of a hearing an attempt is made to frustrate the arbitration by the withdrawal of a party-appointed arbitrator, the neutral arbitrator may continue with the hearing and determine the controversy.

"6. Arbitrators may issue subpoenas for the attendance of witnesses, for the production of books, documents, etc., and have the power to administer oaths. They may also permit the taking of depositions.

"7. Where there is an evident mistake in the description of a person, thing or item of property, or where the award is imperfect in form, upon application and notice, arbitrators may modify or correct the award on such grounds.

"8. The court, on application, may vacate an award which is procured by corruption, fraud or where there was evident partiality on the part of a neutral arbitrator or where the arbitrators exceeded their powers or incompletely performed them or did not grant a fair and full hearing.

"9. The court may also correct an award where there was an evident miscalculation of figures or mistake of person, thing, or property or where the arbitrators exceeded their powers; in such case, the court may either refer the award back to the arbitrators or to new arbitrators.

"10. All applications to the courts regarding an arbitration shall be by motion in order to give the parties prompt determination.

"11. The Uniform Arbitration Act, based as it is upon years of experience in the conduct of arbitration, studies of court decisions and of all arbitration acts, should be carefully considered by professional, business and labor organizations, as well as by legislators, to the end that all states will adopt a standardized procedure for the voluntary submission of disputes for prompt and inexpensive determination by arbitration."

FORM OF BEQUEST

I give, devise and bequeath to the American Arbitration Association, Inc. in New York .....

.....

.....

(Insert the amount of money bequeathed, or a description either of specific personal or real property, or both, given, or if it be the residue of an estate, state the fact.)

NOTE: *All contributions to AAA by gift or membership enrollment are tax exempt.*